01-1291

(1)

Supreme Court, U.S.
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No. [redacted]

IN THE

Supreme Court of the United States

FREDA SUSAN MOWBRAY,

Petitioner,

v.

TEXAS CAMERON COUNTY, ET AL.,

Respondents.

On Petition for Writ of Certiorari
To the Fifth Circuit United States Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Fifth Circuit err in extending absolute immunity to district attorneys for their pre-indictment investigatory activities, including manufacture of inculpatory evidence and suppression of exculpatory evidence?

2. Did the Fifth Circuit err in extending absolute witness immunity to law enforcement officers and lab technicians for non-testimonial acts such as manufacture of inculpatory evidence and suppression of exculpatory evidence?

3. Did the Fifth Circuit err in affirming dismissal of Cameron County by concluding that all relevant actors were "state" actors rather than county actors, and that Cameron County had no duty to provide training in the requirements of *Brady v. Maryland*?

PARTIES TO PROCEEDING

The parties to the proceedings below were the petitioner Freda Susan Mowbray, a/k/a Susie Mowbray, and the following respondents:

1. Defendant Cameron County, a governmental entity.

2. Defendant Benjamin Euresti, a resident of Cameron County, Texas, sued in both his official and individual capacities.

3. Defendant Edmund Cyganiewicz, a resident of Cameron County, Texas, sued in both his official and individual capacities.

4. Defendant Louis Saenz, a resident of Cameron County, Texas, sued in both his official and individual capacities.

5. Defendant Mentford "Dusty" Hesskew, a resident of Travis County, who was a City of Austin police officer at the time of the events described herein and was sued in both his official and individual capacities.

6. Defendant George Gavito, a resident of Cameron County, Texas, sued in both his official and individual capacities.

7. Defendant Estella Mauricio, a resident of Cameron County, Texas, sued in both her official and individual capacities.

8. Defendant Steve Robertson, a resident of Travis County, Texas, sued in both his official and individual capacities.

9. Defendant Margo Mowbray, a resident of Harris County, Texas.

10. Defendant James Mowbray, a resident of Lincoln, Nebraska.

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OPINIONS BELOW

The unreported decisions of the United States District Court for the Southern District of Texas, and the opinion of the Fifth Circuit United States Court of Appeals (reported at 274 F.3d 269 (5th Cir. 2001)), are set forth in the Appendix at App. 21-30a and App. 2-16a, respectively.

BASIS FOR JURISDICTION

The opinion of the Fifth Circuit United States Court of Appeals was filed on December 6, 2001. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Proceedings Below

Plaintiff-Petitioner Susan Mowbray filed suit on December 16, 1998. Defendants Hesskew, Mauricio, Euresti, James Mowbray, and Cameron County filed motions to dismiss under FED.R.CIV.P. 12(b)(6) in January 1999. Defendants Cyganiewicz, Saenz, Margo Mowbray, Avery and Robertson

filed individual motions to dismiss between February and June 1999. Each defendant likewise filed a motion for protection from discovery in April and May of 1999. The trial court granted limited discovery as to immunity issues on August 31, 1999.

Defendants Mauricio, Euresti, Saenz, Cyganiewicz, and Gavito filed motions for summary judgment on the state law claims against them in December 1999. The trial court granted the motions to dismiss on January 28, 2000.[1] Defendant Gavito filed an additional motion for summary judgment on February 11, 2000, based on qualified immunity. On September 19, 2000, the district court denied George Gavito's motions.

On December 6, 2001, the Fifth Circuit affirmed the dismissals and summary judgment that Mowbray challenges, and reversed the denial of summary judgment to Gavito and rendered judgment for him. Mowbray appeals these holdings.

B. Statement of Facts

As he vowed to do, and had attempted before, Bill Mowbray killed himself early in the morning of September 16, 1987. Petitioner Susie Mowbray was next to him in bed at the time. Twice, Cameron County tried Mrs. Mowbray for the murder of her husband. In her first trial, she was convicted, sentenced to life in prison, and served nearly a decade of her sentence before habeas corpus proceedings corrected the miscarriage of justice. She was tried again. As the habeas court predicted, she was acquitted.

1. The Suicide.

At least twice previously, Bill Mowbray had attempted suicide—once by shooting himself. [Habeas Findings, ¶8, App. 31a.] Mr. Mowbray's business, a car dealership, was on

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[1] Petitioner dropped claims against Kristin Avery. The court denied part of defendant Euresti's motion to dismiss with respect to the slander claim.

the brink of complete failure, and Mr. Mowbray had vowed to kill himself rather than be prosecuted by the IRS, as appeared imminent, for tax evasion. [*Id.*]

2. The Investigation.

Bill Mowbray's death was a sensation in Cameron County. The District Attorney's office investigated the death with unshakable determination to prosecute Mrs. Mowbray for killing her husband. The investigative team—which included Respondents Euresti, Cyganiewicz, Saenz, Robertson, Hesskew, Gavito, and Mauricio—focused on the blood evidence, whether real or illusory. As orchestrated by Respondents, the investigation, indictment, prosecution, conviction, and imprisonment of Mrs. Mowbray ultimately turned on her bloody nightgown,[2] which—as Respondents knew—was not bloody after all.

In early October 1987, Respondent Steve Robertson of the Texas Department of Safety ("DPS") met with Respondent Mentford "Dusty" Hesskew, a City of Austin police officer, to discuss the theory that Mrs. Mowbray had killed her husband. Robertson requested that Hesskew perform testing on the physical evidence and render a conclusion. In Robertson's presence, Hesskew examined the nightgown worn by Mrs. Mowbray the night of her husband's death to determine whether there were bloodstains, and if so, what type. As Hesskew testified much later:

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[2] The habeas court observed that the linchpin of the prosecution was the high velocity impact blood spatter allegedly found on the front of Mrs. Mowbray's gown. Evidence of blood on the gown would contradict Mrs. Mowbray's statement that she was lying next to her husband when he shot himself, and support the contrary theory that she was above him, holding the gun to his head. *See* App. 34a.

Q. And after viewing the gown, your conclusion was that there was no bloodstains, correct?

A. Correct.

The investigative team, however, would have its blood.

On November 3, 1987, District Attorney Benjamin Euresti and Assistant District Attorney Edmund Cyganiewicz met with Robertson and Hesskew. [Third Amended Complaint ("TAC") ¶20, App. 67a.] At that meeting, Mr. Robertson explained that luminol tests had been conducted, with a positive result. Mr. Robertson also explained that luminol tests are presumptive in nature (because luminol reacts to many substances other than blood), and *not proof* that blood was present. [TAC ¶20, App. 67a.]

Thus, at this stage, the investigative team knew they had no proof that Mrs. Mowbray's nightgown contained bloodstains. In sworn testimony, DA Euresti admitted his understanding that in order to prove the presence of blood on the gown, he would have to undertake testing other than luminol.

On November 9, 1987, Mr. Robertson conducted two confirmatory blood tests on Mrs. Mowbray's nightgown. Both tests produced negative results, confirming that the substance tested *was not human blood.* [TAC ¶21, App. 67a.] No one on the prosecution's investigative team ever disclosed these critical tests or their exculpatory results to Mrs. Mowbray's counsel. [TAC ¶29, App. 70a.]

Instead, with full knowledge of the negative blood results, Robertson actively participated in the fabrication of Hesskew's junk-science testimony. Hesskew ultimately testified under oath at the trial—with full knowledge of its falsity—that *human blood was found* on the abdomen and chest areas of Mrs. Mowbray's nightgown in a pattern consistent with inculpatory "high velocity impact spatter." Without a confirmatory blood test, Hesskew's conclusion had no basis, and was—as he later understated under oath—"scientifically invalid."

As a continuing part of the prosecution's investigation—still more than two weeks before Mrs. Mowbray was indicted or arrested—the prosecution asked Herbert MacDonell, an internationally-respected expert on blood spatter, to examine the nightgown. [TAC ¶22, App. 67a.] On November 18, 1987, MacDonell met with defendants Euresti and Cyganiewicz in Corning, New York, and informed them that there was no indication of blood stains on Mrs. Mowbray's nightgown, and no indication of high velocity impact spatter of the sort which would have been present had Mrs. Mowbray shot her husband. [TAC ¶¶22-23, App. 67a.]

Unswayed by MacDonell's exculpatory conclusion, the prosecution's investigative team prepared a "mock-up" of the alleged crime scene in an effort to convince MacDonell to change his opinion. [TAC ¶24, App. 68a.]

Despite the prosecution's zeal, MacDonell could not be persuaded to alter his conclusions. [TAC ¶24, App. 68a.] In fact, MacDonell reiterated to Officer Gavito that the facts did not match the prosecution's theory. [*Id.*] These oral conclusions—in which the world's leading expert in the field made clear that the prosecution had no case—were never disclosed to Mrs. Mowbray's counsel by any member of the prosecution's team. Deputy District Attorney Cyganiewicz stated in his deposition that he did not think *Brady v. Maryland* 373 U.S. 83 (1963) applied to oral statements.

Incredibly, immediately after the last meeting with MacDonell in which the expert made clear that the prosecution had no theory, DA Euresti told the public in a press conference that although he had not previously felt that he had a solid case, after meeting with MacDonell he was now confident that he could get an indictment. [TAC ¶24, App. 68a.] Mrs. Mowbray was indicted two days later, on December 4, 1987, and arrested the following day.

3. The *Brady* Hearing and the Trial.

A *Brady* hearing was conducted on March 1, 1988. At that pretrial hearing, Respondent Cyganiewicz stated, "Of course,

everything that is exculpatory has to be turned over, and we will." [Habeas Findings ¶21, App. 36a.] On the record, the parties agreed that all such disclosures would be made on or before March 11, 1988. [Habeas Findings ¶22, App. 37a.] Cyganiewicz's promise, however, turned out to be hollow as a matter of both fact and policy. Several Respondents lacked even rudimentary understanding of *Brady v. Maryland.* Indeed, Respondent Euresti, the Cameron County District Attorney at the time of Mrs. Mowbray's trial, testified that he had no policy or procedure with respect to district attorneys following the *Brady* rule.

Other defendants testified that they received no *Brady* training from either Euresti or any other county official. Defendant Gavito testified:

> **Q.** Do you have an understanding of the Brady rule?
>
> **A.** No, I don't.
>
> **Q.** During the time that you were employed as the lieutenant in charge of the criminal investigations for the Cameron County Sheriff's Department, did you receive any training regarding the Brady rule?
>
> **A.** No, we didn't.
>
> . . .
>
> **Q.** Were there any written procedures about what information should or should not be turned over to any of the defense attorneys?
>
> **A.** No.

Defendant Mauricio testified:

> **Q.** Mrs. Mauricio, as part of that training that you received at the police academy that

you told us about, did you learn about the Brady rule?

A. I don't recall it being mentioned but that was a long time ago.

Q. Okay. In the course of your 14 years of experience with the Cameron County Sheriff's Office, have you learned about the Brady rule?

A. It has never come up.

. . .

Q. Do you have an understanding of what the Brady rule is?

A. I wouldn't be able to tell you.

The prosecution never disclosed Robertson's negative confirmatory blood tests regarding Mrs. Mowbray's nightgown. [TAC ¶¶29-30, App. 70a.] Only when the prosecution was threatened with sanctions by the trial judge did they produce MacDonell's short written report—a few days before trial. [TAC, ¶31, App. 70a; Findings, ¶23, App. 37a.] Yet, as the habeas court concluded, the prosecution knew MacDonell's findings—and that they were exculpatory—*seven months* before trial and long before Mrs. Mowbray's December indictment and arrest. [Findings, ¶19, App. 36a.]

The prosecution led Mrs. Mowbray's counsel to believe that MacDonell would be called to testify, and even issued a trial subpoena for his appearance. [Findings, ¶25, App. 37a.] However, MacDonell was never called to testify, and remained in Corning, New York for the duration of the proceedings. [*Id.*] MacDonell testified that he fully expected to be called to testify at trial, and telephoned the prosecution to inquire when they intended to call him. As the habeas court ultimately concluded:

> State's counsel early on recognized the potential lethal effect of McDonnell's testimony on their theory of the case, and beginning in No-

> vember and continuing until May *they engaged in a deliberate course of conduct to keep McDonnell's findings and opinions from [Plaintiff's] counsel until the last days before trial. Even then, they caused [Plaintiff's] counsel to believe MacDonell would be a witness and available for cross-examination.*

[Conclusion of Law No. 3, App. 40a.]

At trial, the prosecution relied heavily on the testimony of Robertson and Hesskew. Hesskew testified that human blood had been found on the abdomen and chest areas of Mrs. Mowbray's nightgown, in a pattern consistent with high velocity impact spatter. [TAC, ¶26, App. 69a.] Based on that lie, Hesskew concluded that the cause of Mr. Mowbray's death was homicide. [*Id.*] Nine years later, at the habeas hearing, Hesskew recanted his trial testimony as to high velocity impact spatter, and admitted his trial testimony had been without "scientific validity." [Habeas Findings, ¶13, App. 34a.] MacDonell himself observed: "I must volunteer my disappointment in Mr. Cyganiewicz . . . [t]hat he went 'shopping' for another expert who, in my opinion, is both unqualified and apparently dishonest."

Robertson likewise testified at trial, but never revealed—until the habeas hearing nine years later—that his pre-indictment conclusive tests confirmed that there was no blood on the nightgown. [Findings, ¶14 n.1, App. 34a.] When asked later about these reports, Robertson testified under oath that he figured he could simply explain the negative test results at trial.

> **Q.** Did you end up explaining in trial in 1988 the reasons for your negative confirmatory tests?
>
> **A. I was not asked that question.**

Indeed Robertson was *not* asked that critical question at trial. DA Euresti's trial notes show that a question for

Robertson had been prepared regarding the confirmatory tests—but it was never asked. Euresti scratched out the question on his outline. [TAC ¶28, App. 70a.] As Euresti explained at his deposition:

> **Q.** The question that you originally had was, "Did you make a determination as to whether or not the gown tested positive for blood?" Do you see that question?
>
> **A.** Yes, sir.
>
> **Q.** Then you had down in your outline, "What was your determination?" Do you see that?
>
> **A.** Yes, sir.
>
> **Q.** And in this outline you struck that out of the outline, did you not?
>
> **A.** Yes, sir.
>
> . . .
>
> **Q.** You knew you had to prove something other than luminol testing to show there was blood, right?
>
> **A.** Yes, sir.
>
> **Q.** And you clearly elicited testimony that it was blood as we've seen here, correct?
>
> **A.** Yes, sir.
>
> **Q.** And you believed that there was testing other than luminol testing to prove it was blood, correct?
>
> **A.** Yes, sir.

> **Q.** And you never presented any of that testing to the Court, correct?
>
> **A.** Not in the record here on my direct examination, you're correct. It didn't—it didn't come out.

In fact, as Euresti knew, Robertson lied under oath, and testified that "blood droplets" were found on the nightgown. [TAC ¶28, App. 70a.] Robertson admitted in his deposition that he knew his testimony was false:

> **Q.** And at the time that you told the jury under oath that you saw blood droplets, were you aware that the confirmatory blood tests were negative?
>
> **A.** Yes, ma'am.

Thus was Mrs. Mowbray convicted of her husband's murder, and sentenced to life imprisonment. [Findings, ¶9, App. 33a.] Mrs. Mowbray's appeals of her conviction were unsuccessful until her habeas corpus petition was granted by the Texas Court of Criminal Appeals in 1995. In November 1995, after issuing writs and taking testimony, the habeas court granted relief. In a subsequent published opinion, the Court of Criminal Appeals of Texas adopted the 1995 findings, and set aside Mrs. Mowbray's conviction. *Ex Parte Freda S. Mowbray,* 943 S.W.2d 461 (Tex. Cr. App. 1996), *cert. denied,* 521 U.S. 1120 (1997).

This 42 U.S.C. § 1983 lawsuit followed. Federal question jurisdiction under 28 U.S.C. § 1331 is based on the violation of Mrs. Mowbray's Fourteenth Amendment procedural due process right to a fair trial, her Fourth Amendment right to be free from unreasonable search and seizures, and her Fifth Amendment right to a fair trial and to protection from deprivation of liberty and property without due process. Supplemental jurisdiction exists under 28 U.S.C. § 1367 over Mrs. Mowbray's state law claims for false imprisonment, malicious prosecution, abuse of process, slander, intentional infliction of emotional distress and unjust enrichment/

constructive trust because these claims arise out of the same operative facts and the same transaction and/or occurrence as the federal question claims.

REASONS FOR GRANTING THE WRIT

For purposes of reviewing the instant dismissals under Fed. R. Civ. P. 12(b)(6), it is a given that Petitioner seeks redress for a grave miscarriage of justice. The legal question is whether the functioning integrity of our justice system compels us to accept this type of grave injustice as a necessary incident to administering justice generally.

Though absolute immunity is a narrow and sparingly extended exception, the lower courts applied it expansively. Absolute immunity protects prosecutors when they function as advocates in and officers of the court. It protects witnesses when they testify in court. It is not intended to baptize all conspiratorial and tortious acts—such as manufacture of inculpatory evidence and suppression of exculpatory evidence—merely because a trial is the end result. Not all lawyer conduct is "trial preparation," and not all witness conduct is "testimonial." Yet that is exactly what has now been established as dangerous precedent in the Fifth Circuit.

The lower courts have rewritten and inflated the absolute immunity rules, and signaled that manufacture of inculpatory evidence and suppression of exculpatory evidence can never be actionable in a civil lawsuit. The new rule in the Fifth Circuit cannot be reconciled with this Court's absolute immunity jurisprudence and it cannot be reconciled with the rule as it applies in numerous other circuits. It is not merely a single miscarriage of justice at issue, but an aberration with dangerous consequences to the integrity of the justice system.

ARGUMENT

I. The Lower Courts Distorted This Court's Precedent in Extending Absolute Prosecutorial Immunity to Such Abundant, Deliberate, and Injurious Pre-Indictment Misconduct.

The Fifth Circuit erroneously concluded that all of the prosecutors' actions were performed as "advocates of the state" and not in the investigative stage of Mowbray's case. The court of appeals held:

> All the acts Mowbray lists involve the prosecutors' choosing expert witnesses, preparing those witnesses for trial, and performing the state's trial duties. Because these acts fall under the protection of absolute immunity, the district court did not err in dismissing suit as to them.

App. 7a. Here it warrants recitation of "the acts Mowbray lists," as even a cursory review discloses the new remarkably liberal expansion in the Fifth Circuit of activities that are "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). The district attorney defendants' misconduct—nearly all occurring *before* Mrs. Mowbray's indictment and arrest—consists of:

- Determining to pin the death of Bill Mowbray on his wife, regardless of the accumulation of exculpatory evidence, and orchestrating an investigation focused on reaching that preordained result;

- Shopping for "experts" to support their baseless theory of murder, laboring to "sell" these experts on their theory, rejecting the leading authority in the field who refused to capitulate to the desired opinion, and instead selecting an "expert" who perpetrated junk science and admitted after Mrs. Mowbray spent over nine years in prison that his opinion lacked any scientific foundation;

- Ignoring the scientifically sound conclusion of the leading authority on blood spatter that the blood evidence simply did not support their theory;
- *Suppressing* the critical exculpatory conclusions *of the* leading blood-spatter authority, and refusing to tender these findings to defense counsel, as constitutionally required, until a few days before trial, and then only under threat of sanctions by the trial court;
- Suppressing—and refusing to tender at all—the critical *oral* exculpatory findings of the leading blood-spatter authority, as reported emphatically to the DA defendants, and never made known to defense counsel;
- Misleading defense counsel into believing they intended to call the leading blood-spatter authority to testify so that he would be available for cross-examination;
- Suppressing—and refusing to tender at all—the critical exculpatory findings of their own laboratory investigator, who conducted two conclusive tests for blood, both of which were negative;
- Conspiring to manufacture inculpatory blood evidence, under the aegis of "expert scientific opinion";
- Continuing to make public statements indicating Mrs. Mowbray's guilt—even after their murder theory had been scientifically discredited—and even boasting of now having a strong case against Mrs. Mowbray immediately after the leading blood spatter expert advised them that they had *no* case;
- Coaching and procuring knowingly false testimony from their "expert" about the presence of blood on Mrs. Mowbray's nightgown; and
- Coaching and procuring knowingly false testimony from a police officer about the placement of the bed-sheets at the death scene so as to suggest that Bill Mowbray could not have held the gun to his head.

Of the foregoing instances of egregious misconduct, the prosecutors concededly enjoy absolute immunity for their presentation of perjurious testimony. While shameful, the presentation of evidence at trial — even perjurious testimony—is an activity "intimately associated with the judicial phase of the criminal process." *Imbler,* 424 U.S. at 430. Absolute immunity, however, is a limited shield—not a sword—and its invocation for one activity does not automatically trigger its protection for all activities. To confer absolute immunity on all of the foregoing mocks the plain sense of the rule. It declares, for example, that prosecutors enjoy carte blanche as officers of the court *long before even a grand jury—much less a* ***court****—ever gets involved.* It is, in short, a guarantor of further injustice.

A. The New Absolute Immunity Rule in the Fifth Circuit Cannot Be Reconciled with This Court's Limitation to Activities "Intimately Associated with the Judicial Phase of the Criminal Process."

Prosecutors enjoy absolute immunity only for activities that are "intimately associated with the judicial phase of the criminal process." *Imbler,* 424 U.S. at 430. The doctrine reflects a difficult policy choice between the lesser of two evils, and as such occasionally baptizes injustice. *See Kalina v. Fletcher,* 522 U.S. 118, 126-27 (1997) ("the absolute immunity that protects the prosecutor's role as an advocate is not grounded in any special "esteem for those who perform these functions, and certainly not from a desire to shield abuses of office, but because any lesser degree of immunity could impair the judicial process itself.'") (quoting *Malley v. Briggs,* 475 U.S. 335, 342 (1986)).

It is impossible to reconcile the lower court rulings with this Court's precedent. Indeed, this Court has specifically rejected claims of absolute immunity for conduct essentially equivalent to the conduct in this record. *See Burns v. Reed,* 500 U.S. 478, 492-96 (1991) (district attorney's provision of

legal advice to police during pretrial investigation of the facts was protected only by qualified, rather than absolute, immunity); *Buckley v. Fitzsimmons,* 509 U.S. 259, 276-778 (1993) (prosecutor was not acting as advocate either when he held press conference, or when he allegedly fabricated evidence concerning unsolved crime). The Fifth Circuit panel below would have decided *Burns* and *Buckley* differently.

The rule in *Imbler* concisely includes—and *excludes*—immune activities. Thus, by definition, an activity may well be associated with the criminal process, but not its "judicial phase." Or an activity may even be associated with the judicial phase, but not "intimately associated" with it. The lower courts erased these critical distinctions and effectively conferred absolute immunity on all "activities . . . associated with the . . . criminal process." Lower courts cannot thus rewrite this Court's pronouncements.

B. The New Absolute Immunity Rule in the Fifth Circuit Cannot Be Reconciled with This Court's Functional Approach to Absolute Immunity.

Anxious, perhaps, to brighten the line for absolute immunity determinations, the lower courts effectively declared prosecutors off-limits. But this Court directs inquiry into the "nature of the function performed, not the identity of the actor who performed it." *Buckley,* 509 U.S. at 269 (*quoting Forrester v. White,* 484 U.S. 219, 229 (1988)). This Court emphasizes the "primary importance" of "the interest in protecting the proper functioning of the office, rather than the interest in protecting its occupant." *Kalina,* 522 U.S. at 125.

Thus, properly applied, absolute immunity ensures the integrity and functioning of the *judiciary.* Individual prosecutors enjoy immunity only when they act as institutional "advocates" and "officers of the court," *not* when they act as administrative or investigative officers—even if some of their

administrative and investigative activities are "official duties." *Kalina*, 522 U.S. at 125; *see also Buckley*, 509 U.S. at 272 (prosecutor only entitled to qualified immunity when he "functions as an administrator rather than as an officer of the court").

In *Buckley*, this Court held that the prosecutor was not acting as an advocate—and thus not entitled to absolute immunity—when he held a press conference or when he fabricated evidence. 509 U.S. at 273-78. As the Court explained the basis for withholding absolute immunity from evidentiary-investigatory activities:

> There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is "neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other."

Id. at 273-74 (citations omitted). There is indeed "a difference." The Fifth Circuit panel below implicitly disagreed.[3]

On this record, the district-attorney defendants rendered themselves indistinguishable from a corrupt police investigator. The doctrine of absolute immunity is not designed to

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[3] In an era once removed, the Fifth Circuit acknowledged the difference. *See Marrero v. City of Hialeah*, 625 F.2d 499, 505 (5th Cir. 1980) ("[A] prosecutor who assists, directs or otherwise participates with, the police in obtaining evidence prior to an indictment undoubtedly is functioning more in his investigative capacity than in his quasi-judicial capacities of deciding which suits to bring and . . . conducting them in court.") (citation and internal quotations omitted), *cert. denied*, 450 U.S. 913 (1981).

create a hierarchical privilege for lawyers just because they will ultimately conduct a trial. Our system could not tolerate such an aristocratic immunity. Yet the lower courts here conferred absolute immunity for *all* activities from the moment these lawyers first heard of the case. Citing *Imbler*, the Seventh Circuit observed:

> [I]nvestigative activities by attorneys or other executive officials are generally not entitled to absolute immunity. This is so even though one may safely assume that government officials often expect that the fruits of any such investigation may ultimately end up in court. It is only when such activities are intimately associated with the court-related duties of government attorneys that the activities are entitled to absolute immunity.

Auriemma v. Montgomery, 860 F.2d 273, 278 (7th Cir. 1988) (internal citations omitted), *cert. denied*, 492 U.S. 906 (1989); *accord Ireland v. Tunis*, 113 F.3d 1435, 1447 n.7 (6th Cir. 1997) ("Conducting a preliminary investigation is generally removed from a prosecutor's role in a judicial proceeding; 'such investigations take place outside the adversarial arena with its attendant safeguards that provide real and immediate checks to abusive practices.'") (citation omitted), *cert. denied*, 522 U.S. 996 (1997); *Prince v. Hicks*, 198 F.3d 607, 612-13 (6th Cir. 1999) (denying absolute immunity where conduct described in pleadings "occurred while Hicks performed administrative and investigative functions that were not intimately associated with the judicial phase of the criminal proceedings").

It is inconceivable, on this record, that the DA defendants could fairly describe their misconduct as occurring while they behaved as "officers of the court," or state advocates, or other than misbehaving criminal investigators. Assistant DA Cyganiewicz himself stated in a sworn affidavit that the

meetings between prosecutors and MacDonell were part of the **"investigation"** of Mr. Mowbray's death.

Of course, if there is any doubt as to the proper characterization of defendants' activities, then the lower court improperly dismissed Mrs. Mowbray's claims. *See Hill v. City of New York,* 45 F.3d 653, 663 (2nd Cir. 1995) ("Quite plainly, when it may not be gleaned from the complaint whether the conduct objected to was performed by the prosecutor in an advocacy or an investigatory role, the availability of absolute immunity from claims based on such conduct cannot be decided as a matter of law on a motion to dismiss."); *accord Morley v. Walker,* 175 F.3d 756, 759 (9th Cir. 1999) ("To determine immunity, we must accept the allegations in the plaintiff's complaint as true. The official seeking immunity bears the burden of demonstrating that immunity attaches to a particular function. A dismissal for failure to state a claim is appropriate only where it appears, beyond doubt, that the plaintiff can prove no set of facts that would entitle it to relief.") (internal citations omitted).

Indeed, on this record, the question should not even be close. Defendant officials asserting absolute immunity confront the standard negative presumptions of Rule 12(b)(6)—aptly described above by the Second Circuit—as well as the burden of proving their specific and historical entitlement to absolute immunity. As Justice Scalia noted in suggesting that the absolute immunity principle should not be as difficult to apply as might first appear, the "defendant official bears the burden of showing that the conduct for which he seeks immunity would have been privileged at common law in 1871" and thus, "if application of the principle is unclear, the defendant simply loses." *Buckley,* 509 U.S. at 281 (Scalia, J., concurring).

C. The Mischief of the Lower Courts' Unprecedented Expansion of Absolute Prosecutorial Immunity Is Aptly Illustrated by the District Court's Improper and Counterfactual Adjudication, *Sua Sponte*, of Probable Cause to Arrest.

This Court has provided specific guidance for determining when prosecutors act as advocates and officers of the court. That role normally begins on arrest because "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Buckley*, 509 U.S. at 274.[4] Presumably mindful of this Court's specific guidance and aware that it was charting new territory in absolute immunity jurisprudence, the district court issued the following finding, which is extraordinary on this record and in this procedural context: "In the instant case, the police had probable cause to arrest Plaintiff almost from the time they entered on the scene." [1-28-2000 Order, App. at 21a.] The district court erred as a matter of fact, law, logic, and procedure.

First, not even the defendants ever insisted that there was probable cause to arrest Mrs. Mowbray for the murder of her husband on the day of his death—much less produced any evidence for such illusory absolution. Mrs. Mowbray was not arrested and indicted for nearly three months after the death of her husband, and given defendants' investigatory "zeal" in pinning Bill Mowbray's death on his wife, it can surely be inferred that defendants suffered no hesitation over an excessively strict approach to probable cause.

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[4] Careful, however, to avoid *expanding* absolute immunity with excessively bright lines—conspicuously unlike the lower courts here—this Court then added: "Of course, a determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards. Even after that determination . . . a prosecutor may engage in 'police investigative work' that is entitled to only qualified immunity." 509 U.S. at 274 n.5.

Indeed, one of the most shameful spectacles in this miscarriage of justice is DA Euresti's pronouncement that he did not believe he had a solid case before his December 2, 1999 meeting with Herbert MacDonell, the leading authority on blood spatter evidence, but was now confident of getting an indictment [TAC ¶24, ap. 68a]—and that was the meeting at which MacDonell made it emphatically clear to the conspiring defendants that the blood evidence simply did not support their theory of the case. Even "lingering suspicion" should have evaporated at this point—quite apart from "probable cause." Yet Mrs. Mowbray was indicted two days later and arrested the following day. On this record, there was *never* probable cause to indict and arrest Mrs. Mowbray—and the defendants knew it. The district court erred in making a conclusory finding otherwise.

Second, even if defendants had alleged some basis for such a remarkable finding, such "evidence" would serve only to create a fact issue—not to justify dismissing the claims at a stage when all of plaintiff's allegations must be taken as true and all inferences drawn in her favor.[5] *See Posr v. Court Officer Shield # 207*, 180 F.3d 409, 415 (2d Cir. 1999) ("court considering a motion to dismiss under Rule 12(b)(6)" could not construe plaintiff's conduct as creating probable cause to arrest "because there exist plausible interpretations" of that conduct that would not indicate unlawful activity).

Third, the district court had no conceivable justification for adjudicating such a controversial fact issue in this procedural setting when that finding is categorically belied by this record. Probable cause is peculiarly fact-intensive. As the existence *vel non* of probable cause at the time of Bill Mowbray's death has never been addressed or adjudicated, the district court stepped way beyond the line in adjudicating that "fact issue" in the context of a 12(b)(6) dismissal. As Justice Black observed, "[t]he existence of probable cause is

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[5] *See generally Hill*, 45 F.3d at 663; *Morley*, 175 F.3d at 759.

a factual matter that calls for the determination of a factual question." *Spinelli v. United States,* 393 U.S. 410, 433 (1969) (Black, J., dissenting); *see also Illinois v. Gates,* 462 U.S. 213, 232 (1983) ("[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts — not readily, or even usefully, reduced to a neat set of legal rules."); *cf. Hayes v. Florida,* 470 U.S. 811, 815 n.1 (1985) (declining, as excessively "fact-bound issues," State's invitation to review record and hold that there was probable cause to arrest).

In reaching its sweeping embrace of absolute prosecutorial immunity, the district court plainly erred in adjudicating probable cause. Indeed, the district court's erroneous finding ironically *underscores* precisely why the DA respondents are *not* entitled to absolute immunity.

- Whatever the district court's hindsight about probable cause at the time of Bill Mowbray's death, clearly the respondents did not discern sufficient probable cause to have Mrs. Mowbray indicted and arrested at that time—which is to say, the defendants needed time to "investigate."
- The longer defendants "investigated," the *less* "probable cause" existed—yet they persisted in their scheme to deny Mrs. Mowbray her civil rights, which properly states a section 1983 claim for which there is no absolute immunity.
- The district court's attempt to pin a label to an early moment in time as an arbitrary way to immunize all future conduct is inconsistent with the functional test for absolute immunity. Indeed, probable cause to arrest does *not* immunize a prosecutor for investigative activities performed even after arrest. *Buckley,* 509 U.S. at 274 n.5; *Anderson v. Simon,* 217 F.3d 472, 475 (7th Cir. 2000), *cert. denied,* 531 U.S. 1073 (2001).

In sum, the extension of absolute prosecutorial immunity to all activities of the DA respondents is irreconcilable with this Court's absolute immunity jurisprudence. Having been wrongfully condemned to life imprisonment, and having served nearly ten years of that sentence, Mrs. Mowbray now respectfully requests an opportunity to consider the merits.

II. This Court Should Resolve the Circuit Conflict Over Absolute Witness Immunity for Conspiracies to Commit Perjury and Clarify When Witness' Pretrial and Nontestimonial Acts Eliminate Immunity In Any Event.

The lower courts erred in dismissing Mrs. Mowbray's § 1983 claims against Hesskew (the perjurious "expert"), Robertson (the DPS lab technician who confirmed the absence of blood, told no one, and testified otherwise) and Gavito (the investigating officer to whom the world's leading blood spatter expert emphasized that the prosecution had no case) for conspiracy to commit perjury, and for manufacture of inculpatory evidence and suppression of exculpatory evidence.

Mindful that absolute immunity may "leave the genuinely wronged defendant without civil redress" despite "malicious or dishonest action [that] deprives him of liberty," *Imbler*, 424 U.S. at 427, conflicting rules by lower courts warrant special attention by this Court. Otherwise, the measure of necessary injustice is aggravated by the caprice of geography. This Court should now resolve the circuit split on the question of absolute witness immunity against claims of conspiracy to commit perjury.

The Fifth Circuit has now joined the majority of circuits in holding that absolute witness immunity extends to conspiracy claims. "As a matter of logic," the Fifth Circuit panel held, "[a] person may not be prosecuted for conspiring to commit an act that he may perform with impunity.'" 274 F.3d at 277, App. at 8a (quoting *House v. Belford*, 956 F.2d 711, 720 (7th Cir. 1992)). Of the circuits to

consider the matter, only the Second Circuit rejects absolute immunity against claims of conspiracy to commit perjury. *See San Filippo v. U.S. Trust Co.*, 737 F.2d 246, 254-55 (2d Cir. 1984); *Dory v. Ryan*, 25 F.3d 81 (2d Cir. 1994).

Petitioner respectfully contends that the Second Circuit is correct. First, as often occurs with breezy references to "logic" and "common sense," closer examination of the Fifth Circuit panel's adopted truism undermines it.[6] One *cannot*, in fact, commit perjury "with impunity." Indeed, one can go to jail for committing perjury. One can merely commit perjury without fear of answering in civil damages for that perjury. Moreover, the Seventh Circuit (and now Fifth Circuit) "logic" draws upon a fundamentally distinct jurisprudence—and the analogy thus breaks down. At common law, a cause of action for "conspiracy" *per se* does not exist. Thus, it is often stated that absent an independent and actionable tort, there is no claim for "conspiracy"—or, put another way, if one may perform an act "with impunity," then one cannot be liable for conspiracy to do it. Of course, that is to say that the underlying act is not tortuous or unlawful at all. Perjury is quite plainly unlawful.

Second, in reaching a conclusion of such import, the Fifth Circuit panel doubtless expressed its policy preference for robust immunity. But this Court dictates a very different inquiry. "[O]ur role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice." *Malley*, 475 U.S. at 342. The lower courts made no effort whatever to locate their expanded immunity decision in the context of "immunity historically accorded the relevant official at common law and the interests behind it." *Imbler*, 424 U.S. at 421. As Justice Scalia observed, the defendant "simply loses" if he fails to prove that "the conduct for which

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[6] "A true account of the actual is the rarest poetry, for common sense always takes a hasty and superficial view." HENRY DAVID THOREAU, A WEEK ON THE CONCORD AND MERRIMACK RIVERS 325 (Carl F. Hovde ed., Princeton Univ. Press 1980).

he seeks immunity would have been privileged at common law in 1871." *Buckley*, 509 U.S. at 281 (Scalia, J., concurring). There was no hint of meeting this burden.

Indeed, as Petitioner would fully establish in briefing on the merits, the historical evidence points toward a viable cause of action for conspiracy to commit perjury. While witness' testimonial acts would have been immune, the act of conspiring with state officials to present false testimony would have been subject to an action for damages. *See generally* Jennifer S. Zbytowski, Note, *The Case Against Section 1983 Immunity for Witnesses Who Conspire With a State Official to Present Perjured Testimony*, 93 Mich. L. Rev. 2192 (1995) (analyzing nineteenth century treatises and materials).

Third, distinguishing between perjury (immune) and independent conspiratorial acts leading to perjury (not immune) is both sound policy and amply supported by federal precedent. "The simple fact that acts may ultimately lead to witness testimony does not serve to cloak these actions with absolute testimonial immunity." *Spurlock v. Satterfield*, 167 F.3d 995, 1001 (6th Cir. 1999) (*citing Buckley v. Fitzsimmons*, 20 F.3d 789, 796 (7th Cir. 1994) ("constitutional wrongs completed out of court are actionable even if they lead to immunized acts")); *accord Mastroianni v. Bowers*, 160 F.3d 671, 677 (11th Cir. 1998) (absolute testimonial immunity does not "relate backwards" to "protect [a defendant] for any activities he allegedly engaged in prior to taking the witness stand for his grand jury testimony"); *Hammond v. Kunard*, 148 F.3d 692, 696 (7th Cir. 1998) (district court properly denied motions to dismiss where complaint stated claims based not only on false testimony to grand and petit juries, but also on actions prior to prosecutor's decision to take case to grand jury); *Metoyer v. Connick*, 2000 WL 863133 (E.D. La. June 26, 2000), *aff'd*, 252 F.3d 1356 (5th Cir. 2001) (conspiracy to conceal exculpatory evidence pretrial and to prosecute maliciously is "an

actionable constitutional tort under Section 1983, which goes beyond conspiracy to present false testimony").

Significantly, even in jurisdictions where conspiracy to commit perjury is not actionable, "the doctrine of witness immunity does not shield from liability alleged conspiracies to falsify non-testimonial evidence." *Alioto v. City of Shively, Kentucky,* 835 F.2d 1173, 1174 n.1 (6th Cir. 1987). **Blood evidence,** for example. When Robertson and Hesskew conspired to fabricate the evidentiary "fact" of a bloody nightgown—despite Robertson's own *negative* confirmatory blood tests—these defendants conspired to falsify non-testimonial evidence. When Robertson and Hesskew failed to comply with their own *Brady* obligations and participated in the conspiracy to withhold material exculpatory evidence, they engaged in actionable falsification off the witness stand, and they cannot take advantage of absolute immunity to evade accountability.

Thus, in one sense, the Fifth Circuit has simply joined the majority of circuits in expanding absolute immunity to embrace conspiracy to commit perjury, and this Court should resolve that circuit split. In a distinct sense, however, the Fifth Circuit has taken a solo flight to the outermost reaches of immunity jurisprudence and fashioned a rule that looks neither to function nor historical mooring, but instead embraces a kind of "creeping immunity" in which each new link in the immunity chain must merely look something like the immediately preceding link.

Fourth, the only other concern expressed by the Fifth Circuit panel below—that perjury lawsuits will simply be styled "conspiracy to commit perjury" lawsuits (*see* 274 F.3d at 277, App. at 8a)—grossly overstates the specter of improper lawsuits, neglects this Court's capacity to design a standard with workable requirements for conspiracy lawsuits, and ignores the overarching principle that absolute witness immunity "is the exception rather than the rule," *Spurlock,* 167 F.3d at 1003, and must be justified on compelling

historical and policy grounds, not vague disquiet. Careful inquiry into the cause of action that existed in 1871 will likely yield just parameters for a conspiracy claims. *See, e.g.*, Jennifer S. Zbytowski, Note, *The Case Against Section 1983 Immunity for Witnesses Who Conspire With a State Official to Present Perjured Testimony*, 93 Mich. L. Rev. 2192, 2209-10 (1995) (noting that conspiracy claim would have required more than defendant's mere knowledge or acquiescence, and entailed some active participation in wrongful action against plaintiff) (citing 4 William Wait, Actions and Defenses 337-56 (Albany, William Gould & Son 1878); 2 C.G. Addison et al., Wrongs and Their Remedies: A Treatise on the Law of Torts 750 (4th Eng. ed. 1876)).

When Robertson and Hesskew took the witness stand and lied—as when Euresti knowingly elicited their false testimony—certain overriding policies specific to these functions served to protect them from civil liability. Beyond these specific functions and their attendant policies, however, defendants must answer. As the Sixth Circuit has emphasized:

> The doctrine of absolute immunity for testimony is a shield to ensure that those individuals intimately involved in the judicial process are able to carry out their responsibilities without the constant threat of vexatious lawsuits, not a sword allowing them to trample the statutory and constitutional rights of others.

Spurlock, 167 F.3d at 1003-04; *accord Paine v. City of Lompoc*, 265 F.3d 975, 982-83 (9th Cir. 2001).

III. This Court Should Resolve the Circuit Conflict and Confusion Over County Liability for the Deliberate Indifference to Constitutional Rights and Rudimentary Training.

Petitioner challenges Respondent Euresti, then the elected district attorney and an active coconspirator in the deprivation of Mrs. Mowbray's constitutional rights, for his total

abdication of responsibility for training his office in the rudimentary requirements of *Brady v. Maryland*, 373 U.S. 83 (1963)—a cornerstone of public trust in the integrity of the justice system. "[T]raining to impart awareness of constitutional rights is an essential function of an office ... [on] whose administration of justice the public [relies]." *United States v. Foster*, 985 F.2d 466, 469 (9th Cir. 1993); *see also Kyles v. Whitley*, 514 U.S. 419, 439 (1995) ("[D]isclosure will serve to justify trust in the prosecutor as the representative of a sovereignty whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done.").

In reality and indisputably on this record, the *Brady* training default was total and remarkably reckless. Yet the Fifth Circuit panel finessed county liability by holding that DA Euresti was a "state" employee rather than a "county" employee—and thus not a "final policymaker" for purposes of imputing liability to the county. Thus did the Fifth Circuit distort the claim that Petitioner actually made, and directly conflict with the Second Circuit's disposition in *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992).

Where a final policymaker for the county acts to deprive an individual of his constitutional rights, that policymaker acts as the county, not as an employee of the county. *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). Here, the sweeping indifference to and ignorance of *Brady* and perjury rules are properly attributable to the county—either by the acts and deliberate omissions of DA Euresti in his office, as "final policymaker" for DA office polices and as executor of policies that manifest deliberate indifference to constitutional rights, or by the failure of the county policymakers generally to act upon the obvious need for training among assistant district attorneys and police in this sensitive constitutional area. *See generally City of Canton v. Harris*, 489 U.S. 378 (1989).

Petitioner does not challenge the dual roles that a district attorney plays as enforcer of state law and holder of county

office. Nor does Petitioner seek redress from Cameron County for the abundant prosecutorial misconduct committed by DA Euresti and his assistants. Cameron County liability here is properly predicated on the deliberate indifference of DA Euresti to the constitutional rights of defendants and his specific failure to train his own office—*in which he is indisputably the final policymaker for the county*—in the rudiments of *Brady* disclosure requirements.

In *Walker*, 974 F.2d 293, the Second Circuit considered the precise contention embraced by the Fifth Circuit panel below—that the district attorney was a *state* official, and therefore, his deliberate indifference could not trigger municipal liability. Defendant New York City cited *Baez v. Hennessy*, 853 F.2d 73 (2nd Cir. 1988) for the proposition that "when prosecuting a criminal matter, a district attorney in New York State, acting in a quasi-judicial capacity, represents the State, not the county." *Id.* at 294. *Baez*, however, involved a challenge to the decision by an ADA to prosecute an individual and the district attorney's endorsement of that decision. In both *Walker* and the present case, by contrast, the county liability is predicated on the district attorney's management of his office, specifically the decision not to supervise or train assistant district attorneys on *Brady* and perjury issues.

In *Gentile v. County of Suffold*, 926 F.2d 142 (2d Cir. 1991), the Second Circuit held that a county could be held liable for a district attorney's practice of ignoring evidence of police misconduct and sanctioning and covering up wrongdoing. There, the Second Circuit confined *Baez* to challenges to "specific decision[s] of the District Attorney to prosecute." *Id.* at 143. The court in *Walker* found, therefore, that "where a district attorney acts as the manager of the district attorney's office, the district attorney acts as a county policymaker." *Id.* That decision cannot be reconciled with the

Fifth Circuit panel's absolution of DA Euresti and Cameron County.[7] This Court should resolve the conflict.

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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[7] Ironically and illustratively, the district court specifically adjudicated the question of which hat DA Euresti was wearing—and it was the **county** hat. By Order dated March 27, 2000, the court dismissed intentional tort claims based upon Texas Civil Practices and Remedies Code § 101.106, which requires that once intentional tort claims are dismissed against the County, the same claims against County employees must likewise be dismissed. In its Order, the court unambiguously described defendants Euresti, Saenz, Cyganiewicz, Gavito, and Mauricio as **"the County's employees"** entitled to the benefit of § 101.106. App. at 20a. The Fifth Circuit panel simply ignored that irreconcilable adjudication.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE

FIFTH CIRCUIT

No. 00-40504

FREDA SUSAN MOWBRAY,
ALSO KNOWN AS SUSIE MOWBRAY,
Plaintiff-Appellant,

versus

CAMERON COUNTY, TEXAS;
BENJAMIN EURESTI, JUDGE;
EDMUND CYGANIEWICZ;

LUIS V. SAENZ;
MENTFORD HESSKEW, "DUSTY";
GEORGE GAVITO; STEVE ROBERTSON;
ESTELLA MAURICIO; JEAN MOWBRAY;
JAMES MOWBRAY;

MARGO MOWBRAY; AND KRISTEN MOWBRAY,
Defendants-Appellees.

No. 00-41229

FREDA SUSAN MOWBRAY,
ALSO KNOWN AS SUSIE MOWBRAY,
Plaintiff-Appellee,

versus

TEXAS CAMERON COUNTY; ET AL,
Defendants,

GEORGE GAVITO,
Defendant-Appellant.

APPEALS FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

December 6, 2001

BEFORE JONES, SMITH, AND DEMOSS, CIRCUIT JUDGES.

JERRY E. SMITH, CIRCUIT JUDGE:

After Fredda "Susan" Mowbray ("Mowbray") had served nine years in prison for her husband's murder, her conviction was set aside, whereupon, under 42 U.S.C. § 1983 and state law, she sued the county that had jailed her and the three prosecutors, three police officers, and the county lab technician who had participated in her trial; she also sued her husband's heirs to regain the proceeds from his life insurance policy. The district court dismissed all of Mowbray's claims but one, against Officer George Gavito.

Mowbray appeals several Fed. R. Civ. P. 12(b)(6) dismissals and a summary judgment based on prosecutorial immunity, absolute witness immunity, and qualified immunity, and a dismissal based on *res judicata*. Gavito appeals a denial of summary judgment based on qualified immunity. We affirm the dismissals and summary judgment that Mowbray challenges, but we reverse the denial of summary judgment to Gavito and render judgment for him.

I.

One night in September 1987, Mowbray was lying in bed with her husband, Bill Mowbray, when he was shot. Mowbray claimed that her husband had committed suicide; at least twice before, he had attempted suicide, once by shooting himself. Bill Mowbray's car dealership was on the brink of failure, and apparently he had vowed to kill himself rather than face jail for tax evasion or commercial fraud.

Estelle Mauricio, a reserve deputy sheriff, was the first to arrive at the residence after the shooting. She testified that she found the deceased still alive, shot through the head, and lying on his left side with the bed covers pulled up to his

shoulder. The bullet had entered the right side of his head, exited the left, and wounded his left hand, which was under his head with a pillow between his head and left hand. His right hand was lying across his chest under the bed covers. No blood or brain matter was on his right hand, and Mauricio never saw his hand being washed at home or in the hospital. Lieutenant George Gavito of the Cameron County Sheriff's Department also was present at the scene.

Dr. Dahm, who conducted the autopsy, stated that if the deceased had shot himself, there would have been blood and brain matter covering his right hand, fingers, and forearm. Finding no blood, Dahm concluded that the death was a murder.

Mowbray was considered a suspect. In early October 1987, Steve Robertson, a lab technician at the Texas Department of Public Safety ("DPS"), met with police officer Mentford "Dusky" Hesskew to discuss the theory that Mowbray had killed her husband. Hesskew was principally employed by the Austin Police Department but also taught classes at the DPS Academy on high impact spatter. Hesskew performed a luminol test on the nightgown Mowbray wore that night to detect the presence of blood. Because luminol reacts to substances other than blood, luminol tests are only presumptive in nature.

On November 3, 1987, Robertson and Hesskew met with prosecutors Benjamin Euresti and Edmund Cyganiewicz and reported that the nightgown had tested positive for blood. On November 9, Robertson conducted two confirmatory blood tests on the nightgown, both of which were negative. At the habeas corpus proceedings, he explained that the negative results could have resulted from the excessive testing the nightgown had already undergone. The tests for the gunshot residue could have destroyed the protein in the blood, and the chemicals sprayed to detect lead residue could have diffused or dissolved the red stains. Robertson never reported

these negative results to the district attorneys, Hesskew, or Mowbray's defense counsel.

The prosecution asked Herbert MacDonnell, an expert on blood spatter, to examine Mowbray's nightgown. On November 18, MacDonnell told Euresti and Cyganiewicz that he had found no indication of blood stains or high velocity impact spatter of the sort that would have been present had Mowbray shot her husband while wearing a nightgown. He concluded that if Mowbray had shot her husband, she was not wearing a nightgown at the time.

Cyganiewicz, Euresti, Gavito, Mauricio, and assistant district attorney Luis Saenz prepared a "mock-up" of the shooting scene. The mock-up did not alter MacDonnell's conclusions that he had listed in his report. On December 2, 1987, MacDonnell discussed his report with Gavito and stated that he thought Mowbray had shot her husband while she was naked. The only record of MacDonnell's statement comes from Gavito's deposition testimony. MacDonnell's report was made available to Mowbray's defense counsel ten days to two weeks before trial.

On December 4, 1987, Mowbray was indicted for murder. At trial, the prosecution offered Hesskew's and Robertson's testimony that blood was found on the nightgown; neither side called MacDonnell. Mowbray was convicted and sentenced to life imprisonment. After her petition for writ of habeas corpus was granted and the conviction was set aside, *see Ex Parte Mowbray,* 943 S.W.2d 461 (Tex. Crim. App. 1996), she was acquitted at a second trial.

II.

Mowbray sued Cameron County, three prosecutors, three police officers, and a county lab technician, alleging conspiracy to violate her civil rights, false imprisonment, malicious prosecution, abuse of process, slander, and intentional infliction of emotional distress. She also sued Jeanne, James, and

Margo Mowbray to regain the proceeds of her husband's life insurance policy.

III.

We review a rule 12(b)(6)[8] dismissal *de novo*, accepting all well-pleaded facts as true. Questions of fact are viewed in the light most favorable to the plaintiff; questions of law are reviewed *de novo*. *Green v. State Bar of Tex.*, 27 F.3d 1083, 1086 (5th Cir. 1994).

Mowbray argues that the district court erred in extending absolute immunity to Euresti, Cyganiewicz, and Saenz, whom she accuses of "shopping for experts," "laboring to sell these experts on their theory," and "rejecting the leading authority in the field ... and instead selecting an expert who perpetrated junk science." Mowbray also complains that the prosecutors did not turn over exculpatory evidence to the defense until ten days before trial.

Under § 1983, prosecutors are entitled to absolute immunity for acts performed as advocates of the state. *Imbler v. Pachtman*, 424 U.S. 409, 430-31 & n.33 (1976). For "acts of investigation or 'administration,'" prosecutors are entitled to only qualified immunity. *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993). Absolute immunity extends to a prosecutor's actions "'preliminary to the initiation of a prosecution and ... apart from the courtroom.'" *Id.* at 272 (quoting *Imbler*, 424 U.S. at 431 n.33). This includes a prosecutor's decision on "which witnesses to call and what other evidence to present," *Imbler*, 424 U.S. at 431 n.33, and "an out-of-court 'effort to control the presentation of [a] witness' testimony,'" *Buckley*, 509 U.S. at 272-73 (quoting *Imbler*, 424 U.S. at 430 n.32) (alteration in original).

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[8] Rule 12(b)(6) authorizes a court to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

All the acts Mowbray lists involve the prosecutors' choosing expert witnesses, preparing those witnesses for trial, and performing the state's trial duties. Because these acts fall under the protection of absolute immunity, the district court did not err in dismissing suit as to them.

IV.

Although Mowbray argues that the court erred in failing to address her slander claim under § 1983, she has not alleged facts sufficient to state a claim. She asserts that after meeting with MacDonnell, Euresti opined that "he was now confident that he could get an indictment." Mowbray never avers that this comment (or any other) deprived her of a constitutional or other federal right; she states only that she "was publicly humiliated and subjected to scorn and ridicule during the investigative phase of the prosecution" and that she was "put through an emotionally damaging trial." Such allegations do not state a claim under § 1983.

V.

Mowbray contends that the court erred in dismissing her § 1983 claims against Hesskew and Robertson for conspiracy to commit perjury and violation of a duty under *Brady v. Maryland*, 373 U.S. 83 (1963), to disclose exculpatory evidence. Although witnesses are entitled to absolute immunity against § 1983 suits based on their testimony in a criminal trial, *Briscoe v. LaHue*, 460 U.S. 325, 329-31 (1983), it is less certain whether the rule of *Briscoe* extends to claims that a witness entered a pre-trial conspiracy to commit perjury.

Of the eight circuits that have addressed the issue, seven have extended absolute witness immunity.[9] The Second Circuit stands alone in reaching a contrary conclusion.[10]

We find the reasoning of the majority of circuits persuasive. As a matter of logic, "[a] person may not be prosecuted for conspiring to commit an act that he may perform with impunity." *House*, 956 F.2d at 720. Hesskew and Robertson cannot be liable under § 1983 for conspiracy to commit perjury where § 1983 grants them absolute immunity for that act.[11]

Moreover, allowing such conspiracy suits would permit most § 1983 perjury suits to be restyled as § 1983 claims for conspiracy to commit perjury, because "a witness rarely prepares her testimony on her own." *Franklin*, 201 F.3d at 1101-02. Accordingly, we conclude that absolute witness immunity bars § 1983 suits for conspiracy to commit perjury.

Mowbray's second claim, that Hesskew and Robertson violated their duties under *Brady* when they failed to furnish exculpatory *Brady* material to Mowbray's defense counsel, is without merit. *Brady* imposes a duty on prosecutors to share

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[9] *Franklin v. Terr*, 201 F.3d 1098, 1101-03 (9th Cir. 2000); *Jones v. Cannon*, 174 F.3d 1271, 1288-89 (11th Cir. 1999); *Watterson v. Page*, 987 F.2d 1, 9 (1st Cir. 1993); *Snelling v. Westhoff*, 972 F.2d 199, 200 (8th Cir. 1992); *House v. Belford*, 956 F.2d 711, 720-21 (7th Cir. 1992); *Miller v. Glanz*, 948 F.2d 1562, 1569 (10th Cir. 1991); *Alioto v. City of Shively*, 835 F.2d 1173, 1174 (6th Cir. 1987).

[10] *San Filippo v. U.S. Trust Co.*, 737 F.2d 246, 254-55 (2d Cir. 1984).

[11] *Cf. Hale v. Townley*, 45 F.3d 914, 920-21 (5th Cir. 1995) (finding that where each state action alleged to have harmed the plaintiff is protected by qualified immunity, there can be no § 1983 suit for conspiracy to violate plaintiff's constitutional rights); *Holloway v Walker*, 765 F.2d 517, 522 (5th Cir. 1985) ("It is a well established rule that where a judge's absolute immunity would protect him from liability for the performance of particular acts, mere allegations that he performed those acts pursuant to a bribe or conspiracy will not be sufficient to avoid the immunity.").

exculpatory evidence with the defense. Mowbray cites, and our research reveals, no case extending *Brady* to police officers or lab technicians.[12] Accordingly, Mowbray has failed to allege an actionable claim against Hesskew or Robertson.

VI.

Mowbray argues that the district court erred in dismissing her § 1983 claim against James Mowbray for conspiracy to violate her civil rights. While it is possible, in limited circumstances, to allege a § 1983 conspiracy against a private actor, *Brummett v. Camble,* 946 F.2d 1178, 1184-85 (5th Cir. 1991), Mowbray fails to do so. Her complaint consists almost entirely of conclusional allegations. The only facts she provides are that James Mowbray met with the police, answered their questions, and took an interest in the investigation of his brother's death; these do not state a claim under § 1983.

VII.

Mowbray challenges the dismissal of her § 1983 claims against Cameron County. She first argues that the county is liable for the unconstitutional acts of its final policymakers. Although *Turner v. Upton County,* 915 F.2d 133 (5th Cir. 1990), does allow such suits, Mowbray has alleged constitutional deprivations only against Euresti, Cyganiewicz, Saenz, Hesskew, Gavito, Robertson, and Mauricio — prosecutors, lower level police officers, and a lab technician.

The sheriff is the county's final policymaker in this context. *Id.* at 136. The district attorney, "when acting in the

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[12] Mowbray does not allege, nor do the facts support a finding, that Hesskew and Robertson elicited false evidence and deliberately concealed exculpatory evidence from all parties, including the prosecution. *Cf. Geter v. Fortenberry,* 849 F.2d 1550, 1558 (5th Cir. 1988) (concluding such allegations defeat a police officer's qualified immunity under § 1983).

prosecutorial capacity [or] instituting criminal proceedings to enforce state law," is not. *Esteves v. Brock,* 106 F.3d 674, 678 (5th Cir. 1997). Mowbray has alleged no constitutional deprivation against the county sheriff, and her allegations against the prosecutors involve only actions as state officers; accordingly, the district court did not err in dismissing her *Turner* claim.

Mowbray also argues that the county is liable for the unconstitutional acts of its officers because it failed to train them on their *Brady* duties. *See City of Canton v. Harris,* 489 U.S. 378 (1989). Because Euresti, Cyganiewicz, and Saenz are state officers, the county cannot be liable for a failure to train them. For Hesskew, Gavito, Robertson, and Mauricio, Mowbray fails to allege a constitutional deprivation and thus fails to state a claim under § 1983. As discussed *supra,* neither police officers nor lab technicians have a *Brady* duty to disclose exculpatory information.

VIII.

We review a grant or denial of summary judgment *de novo, NCNB Tex. Nat'l Bank v. Johnson,* 11 F.3d 1260, 1264 (5th Cir. 1994), applying the same standard as did the district court, *Deas v. River W., L.P.*, 152 F.3d 471, 475 (5th Cir. 1998). "Summary judgment is proper when no issue of material fact exists and the moving party is entitled to judgment as a matter of law. Questions of fact are viewed in the light most favorable to the nonmovant and questions of law are reviewed de novo." *Id.*

Mowbray argues that the court erred in granting summary judgment for Mauricio on the § 1983 claims that Mauricio fabricated trial testimony and failed to disclose exculpatory evidence. Absolute witness immunity insulates Mauricio from the § 1983 perjury claim, so the district court was correct to dismiss it under rule 12(b)(6). *Briscoe,* 460 U.S. at 329-31.

For the failure to disclose claim, Mowbray provides only conclusional allegations. Her brief concedes that there is no factual basis for her claim and that she has only suspicion that Mauricio knew of exculpatory evidence. Mauricio, on the other hand, submitted an affidavit attesting that she knew of no exculpatory evidence. Consequently, the court did not err in granting summary judgment for Mauricio.[13]

IX.

A.

Gavito contends that the court erred in denying his motion for summary judgment on qualified immunity grounds. As an initial matter, we must verify our jurisdiction over this appeal. *Mosley v. Cozby,* 813 F.2d 659, 660 (5th Cir. 1987).

"[D]istrict court orders denying summary judgment on the basis of qualified immunity are immediately appealable under the collateral order doctrine, when based on an issue of law." *Cantu v. Rocha,* 77 F.3d 795, 802 (5th Cir. 1996). Orders "are based on an issue of law when they concern only application of established legal principles, such as whether an official's conduct was objectively reasonable in light of clearly established law, to a given . . . set of facts." *Id.* (citing *Johnson v. Jones,* 515 U.S. 304 (1995)).

Mowbray and Gavito rely on the same record in their briefs; the only dispute is whether the district court correctly applied the law of qualified immunity to these facts. We thus conclude we have jurisdiction to hear this appeal.

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[13] Further, as discussed *supra,* police officers have no duty under *Brady* to disclose exculpatory evidence to defense counsel. Even had Mowbray alleged facts showing that Mauricio withheld evidence, Mowbray's claim would fail as matter of law.

B.

Mowbray alleges a § 1983 claim for conspiracy to violate her civil rights, based on (1) failure to disclose exculpatory evidence to Mowbray's defense counsel; (2) manufacture of false evidence; and (3) suppression of evidence. Before we can reach the § 1983 conspiracy claim, we must determine whether qualified immunity applies to each state claim. *Hale v. Townley*, 45 F.3d 914, 920-21 (5th Cir. 1995). If all three acts fall under qualified immunity, there can be no § 1983 conspiracy claim. *Id.*

As a police officer, Gavito enjoys qualified immunity for his official acts. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To overcome qualified immunity, Mowbray must show Gavito (1) violated a constitutional right that (2) was clearly established at the time of the violation (3) through conduct that was objectively unreasonable. *Kipps v. Caillier*, 197 F.3d 765, 768 (5th Cir. 1999), *cert. denied*, 121 S. Ct. 52 (2000).

Mowbray claims that Gavito had a *Brady* duty to tell defense counsel about his lunch meeting with MacDonnell at which MacDonnell stated he believed Mowbray had shot her husband while not wearing a nightgown. As we have said, even if MacDonnell's statement were exculpatory, police officers have no constitutional duty under *Brady* to disclose exculpatory evidence to defense counsel. For her assertion that Gavito manufactured false evidence and suppressed evidence, Mowbray provides only conclusional allegations.

Even under a generous reading of Mowbray's complaint and brief, the only possible factual basis she alleges is that Gavito participated in a "mock-up" of the crime scene and arrested her pursuant to a warrant. But Mowbray provides no evidence that Gavito acted improperly in the mock-up or that there were any constitutional defects in her arrest. She has not shown Gavito violated any constitutional right, much less one clearly established at the time of her prosecution. Therefore, Gavito is entitled to qualified immunity for his

actions, and the § 1983 conspiracy claim based on them must fail.

Mowbray also lists a host of state law claims for abuse of process, malicious prosecution, false imprisonment, and intentional infliction of emotional distress. The state law claims, like her § 1983 claim, consist mainly of conclusional allegations.[14] Mowbray complains that Gavito investigated the crime, participated in a mock-up of the crime scene, arrested her, and failed to disclose exculpatory evidence to her defense counsel.

Police officers are entitled to official immunity from suits arising out of performance of (1) discretionary duties (2) in good faith as long as they are (3) acting within their authority. *City of Lancaster v. Chambers,* 883 S.W.2d 650, 653 (Tex. 1994). The defendant claiming official immunity bears the burden of proving all elements of the defense. *Id.* Under Texas law, an officer's investigation of a crime, *Wyse v. Dep't of Pub. Safety,* 733 S.W.2d 224, 227 (Tex. App. — Waco 1986, writ ref'd n.r.e.), and arrest of a suspect, *Dent v. City of Dallas,* 729 S.W.2d 114, 117 (Tex. App. — Dallas 1986, writ ref'd n.r.e.), are considered discretionary duties within police authority. Gavito thus satisfies the first and third criteria for official immunity.

Texas law judges an officer's good faith under the same test federal courts employ for qualified immunity determinations under § 1983. *City of Lancaster,* 883 S.W.2d at 656. Texas courts "look to whether a reasonable official could have believed his or her conduct to be lawful in light of clearly established law and the information possessed by the official at the time the conduct occurred." *Id.* (internal quotation marks and citations omitted). Like qualified immunity, official immunity "protects all but the plainly incom-

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[14] Because the state law claims arise out of the same set of operative facts as do the federal claims, we have supplemental jurisdiction to hear them. 28 U.S.C. § 1367.

petent or those who knowingly violate the law." *Id.* (internal quotation marks and citations omitted).

As we have stated, there is no evidence that Gavito did anything illegal in investigating the crime, participating in the mock-up, arresting Mowbray, or failing to disclose MacDonnell's statements to defense counsel. Gavito's actions thus are immune from state suit because of official immunity. Because all of Mowbray's claims against Gavito fail as a matter of law, the district court erred in denying Gavito summary judgment.

X.

After Mowbray was convicted, the proceeds from her husband's life insurance policy were divested from her and awarded to the deceased's mother. *Mowbray v. Metro. Life Ins. Co.*, Civ. Ac. No. B-88-107 (S.D. Tex. Apr. 24, 1991). Two years after her conviction was set aside, Mowbray filed a motion in federal court requesting that the 1991 judgment be vacated, that Jeanne Mowbray repay her the life insurance money, and that the court "impose a constructive trust in said moneys so received." The court set aside the 1991 judgment but denied "all further relief prayed for." *Mowbray v. Metro. Life Ins. Co.*, Civ. Ac. No. B-88-107 (S.D. Tex. May 24, 1999).

Mowbray did not appeal the denial of her constructive trust claim. In 1999, she filed her first amended complaint in the instant case, suing James and Margo Mowbray, Jeanne Mowbray's heirs, to impose a constructive trust on the insurance proceeds. The defendants moved to dismiss based on res judicata. The court denied the motion because there was no certified copy of the judgment in the record. Defendants filed a second motion to dismiss, omitting mention of res judicata because the district court had stated it would not consider such a motion. The court granted the motion, raising the issue of res judicata *sua sponte*.

We review a dismissal based on res judicata *de novo*. *Recoveredge L.P. v. Pentecost*, 44 F.3d 1284, 1290 (5th Cir. 1995). We apply federal law to determine the preclusive effect of a federal judgment, even if that judgment was based on state law. *Id.*

A.

Generally, res judicata is an affirmative defense that must be pleaded, not raised *sua sponte*. Fed. R. Civ. P. 8(c). We recognize two limited exceptions to this rule; both apply here. The first exception allows "[d]ismissal by the court sua sponte on res judicata grounds . . . in the interest of judicial economy where both actions were brought before the same court." *Boone v. Kurtz*, 617 F.2d 435. 436 (5th Cir. 1980); *accord United Home Rentals, Inc. v. Tex. Real Estate Comm'n*, 716 F.2d 324, 330 (5th Cir. 1983). Both actions were brought in the same federal district court. Further, like the judgments in *Boone*, the actions are "almost identical," differing only in the defendants' names. The parties do not dispute the facts, so remanding would add nothing to the record and would only consume judicial resources.

The second exception holds that "where all of the relevant facts are contained in the record before us and all are uncontroverted, we may not ignore their legal effect, nor may we decline to consider the application of controlling rules of law to dispositive facts, simply because neither party has seen fit to invite our attention by technically correct and exact pleadings." *Am. Furniture Co. v. Int'l Accommodations Supply*, 721 F.2d 478, 482 (5th Cir. Unit A Mar. 1981). Here the facts are uncontested and the legal outcome unambiguous. Reversal would not lead to a different outcome.

Additionally, the usual concerns preventing a court from raising res judicata *sua sponte* do not apply. Mowbray "can claim no surprise or prejudice." *Id.* She certainly had notice of the prior judgment; she had litigated it just a few months earlier. Nor has she been denied "'the chance to argue . . .

why the imposition of an estoppel would be inappropriate.'" *Id.* (quoting *Blonder-Tongue Labs. v. Univ. Found.*, 402 U.S. 313, 350 (1971)). James and Margo Mowbray had filed an earlier motion to dismiss based on res judicata, which Mowbray had ample opportunity to answer.

B.

Thus concluding that the district court did not err in raising the issue, we address it on the merits. In *American Furniture*, we set forth the requirements for a res judicata defense:

"(1) that the prior judgment must have been rendered by a court of competent jurisdiction; (2) that there must have been a final judgment on the merits; (3) that the parties, or those in privity with them, must be identical in both suits; and (4) that the same cause of action must be involved in both suits."

Id. (quoting *Stevenson v. Int'l Paper Co.*, 516 F.2d 103, 108-09 (5th Cir. 1975)).

It is indisputable that all four requirements are satisfied. The 1999 judgment decided the issue, so the district court did not err in dismissing the claim.

In summary, the dismissals and summary judgment entered against Mowbray are AFFIRMED, and the denial of summary judgment in favor of Gavito is REVERSED, and judgment is RENDERED for him. All outstanding motions are denied.

United States District Court
Southern District of Texas
ENTERED
MAR 28 2000
Michael N. Milby, Clerk of Court
By Deputy Clerk /s/ ILLEGIBLE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

FREDA SUSAN MOWBRAY, Plaintiff,	§	
v.	§	CIVIL ACTION NO. B-98-183
CAMERON COUNTY, ET AL., Defendants.	§	

FINAL JUDGMENT

BE IT REMEMBERED that on March 27, 2000, the Court having granted Defendants' motions for summary judgment and partial motions for summary judgment and having determined that there is no just reason for delaying entry of a partial final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, it is ORDERED that judgment be entered in favor of all Defendants except Defendant Gavito. It is further ORDERED that Plaintiff MOWBRAY take NOTHING from Defendants and all claims against Defendant are DISMISSED with prejudice.

DONE at Brownsville, Texas, this 28th day of March 2000.

/s/ HILDA G. TAGLE
Hilda G. Tagle
United States District Judge

United States District Court
Southern District of Texas
ENTERED
MAR 28 2000
Michael N. Milby, Clerk of Co
By Deputy Clerk /s/ ILLEGIB

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

FREDA SUSAN MOWBRAY, Plaintiff,	§	
v.	§	CIVIL ACTION NO. B-98-183
CAMERON COUNTY, ET AL., Defendants.	§	

FINAL JUDGMENT

BE IT REMEMBERED that on March 27, 2000, the Court considered Defendant STEVE ROBERTSON's Rule 54(b) motion for entry of final judgment (Dkt. No. 121). Defendant's motion is GRANTED.

Having granted a motion for summary judgment by Defendant, the Court determines that there is no just reason for delaying entry of a partial final judgment. Thus, it is ORDERED that judgment be entered in favor of Defendant ROBERTSON. It is further ORDERED that Plaintiff MOWBRAY take NOTHING from Defendant ROBERTSON and all claims against Defendant ROBERTSON are DISMISSED with prejudice.

DONE at Brownsville, Texas, this 28th day of March 2000.

/s/ HILDA G. TAGLE
Hilda G. Tagle
United States District Judge

BEST AVAILABLE COPY

United States District Court
Southern District of Texas
ENTERED
MAR 28 2000
Michael N. Milby, Clerk of Court
By Deputy Clerk /s/ ILLEGIBLE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

FREDA SUSAN MOWBRAY, Plaintiff,	§	
v.	§	CIVIL ACTION NO. B-98-183
CAMERON COUNTY, ET AL., Defendants.	§	

FINAL JUDGMENT

BE IT REMEMBERED that on March 27, 2000, the Court considered Defendant MENTFORD "DUSTY" HESSKEW's Rule 54(b) motion for entry of final judgment (Dkt. No. 119). Defendant's motion is GRANTED.

Having granted a motion for summary judgment by Defendant, the Court determines that there is no just reason for delaying entry of a partial final judgment. Thus, it is ORDERED that judgment be entered in favor of Defendant HESSKEW. It is further ORDERED that Plaintiff MOWBRAY take NOTHING from Defendant HESSKEW and all claims against Defendant HESSKEW are DISMISSED with prejudice.

DONE at Brownsville, Texas, this 28th day of March 2000.

/s/ HILDA G. TAGLE
Hilda G. Tagle
United States District Judge

United States District Court
Southern District of Texas
ENTERED
MAR 28 2000
Michael N. Milby, Clerk of Cou
By Deputy Clerk /s/ ILLEGIBL

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

FREDA SUSAN MOWBRAY, Plaintiff,	§	
v.	§	CIVIL ACTION
CAMERON COUNTY, ET AL., Defendants.	§	NO. B-98-183

FINAL JUDGMENT

BE IT REMEMBERED that on March 27, 2000, the Court memorialized its ORDERS entered on the record at the December 20, 1999, motion hearing.

1. At the motion hearing on December 20, 1999, the Court GRANTED in part Defendant Cameron County's motion to dismiss (Dkt. No. 17). Specifically, the Court dismissed all intentional torts claimed against Defendant Cameron County.

2. Moreover, at the December 20, 1999, hearing, the Court GRANTED Defendant Cameron County's motion to dismiss Plaintiff's prayer for punitive damages against Cameron County.

3. Thus, pursuant to Rule 54(b) the Court ORDERS that Plaintiff Mowbray take nothing from Defendant Cameron County and all intentional tort claims against the Defendant Cameron County are DISMISSED with prejudice.

DONE at Brownsville, Texas, this 28th day of March 2000.

/s/ HILDA G. TAGLE
Hilda G. Tagle
United States District Judge

United States District Court
Southern District of Texas
ENTERED
JAN 31 2000
Michael N. Milby, Clerk of Court
By Deputy Clerk /s/ ILLEGIBLE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

FREDA SUSAN MOWBRAY, A/K/A SUSIE MOWBRAY Plaintiff, v. CAMERON COUNTY, ET AL., Defendants.	§ § § § § § §	CIVIL ACTION NO. B-98-183

ORDER

BE IT REMEMBERED that on January 28, 2000, the Court considered all pending motions.

1. Defendant Euresti's motion to dismiss (Dkt. No. 18) is GRANTED in part and DENIED in part.

2. Defendant Saenz and Cyganiewicz's motion to dismiss (Dkt. No. 29) is GRANTED.

3. Defendant Hesskew's motion to dismiss (Dkt. No. 9) is GRANTED.

4. Defendant Robertson's motion to dismiss and for judgment on the pleadings (Dkt. No. 73) is GRANTED

5. Defendant Mauricio's motion to dismiss and for summary judgment (Dkt. No. 19) is GRANTED.

6. Defendant Cameron County's motion to dismiss (Dkt. No. 17) is GRANTED and motion to re-urge motion to dismiss (Dkt. No. 86) is MOOT.

7. Defendant Margo Mowbray's motion to dismiss (Dkt. No. 50) is GRANTED.

TRUE COPY I CERTIFY
ATTEST:
MICHAEL N. MILBY, Clerk of Court
By /s/ ILLEGIBLE
Deputy Clerk

8. Defendant James Mowbray's motion to dismiss (Dkt. No. 90) is GRANTED.

9. Defendant James Mowbray's motion for protection from discovery (Dkt. No. 93) is GRANTED.

10. Plaintiff Mowbray's motion for leave to file late response to James Mowbray's second rule 12(b)(6) motion to dismiss (Dkt. No. 96) is GRANTED.

Standard for motion to dismiss.

Rule 12(b)(6) of the Federal Rules of Civil Procedure authorize dismissal of a complaint for "failure to state a claim upon which relief can be granted." A Rule 12(b)(6) motion should be granted only if it appears beyond doubt that the Plaintiff could prove no set of facts in support of her claim that would entitle her to relief. See *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In determining whether to grant a motion to dismiss, the Court must accept all well-pleaded facts as true and view them in the light most favorable to the nonmovant Plaintiff.

A. Prosecuting Attorneys

Plaintiff has alleged causes of action against then District Attorney Euresti, and Assistant District Attorneys Cyganiewicz and Saenz. Defendants claim that as prosecuting attorneys they are entitled to absolute immunity from suit under § 1983. Moreover, if absolute immunity is not applicable, they argue that qualified immunity applies.

Prosecutors are entitled to absolute immunity from § 1983 claims arising from the initiation and pursuit of a criminal prosecution. See *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976). *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993). In *Buckley* the Supreme Court established a functional approach to determining when a prosecutor is entitled to absolute immunity. "[A]cts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate

for the state, are entitled to the protections of absolute immunity." *Buckley*, 509 U.S. at 273. The functional approach distinguishes between investigative or administrative actions on the one hand and prosecutorial or judicial functions on the other. Investigative actions are not entitled to absolute immunity. Prosecutorial actions are entitled to absolute immunity. The Defendants have the burden of establishing that they were functioning as advocates.

Two factors, timing and function, are to be considered in determining whether an action is investigative or prosecutorial. A prosecutor may be acting as an advocate before judicial proceedings have been commenced. See *Kalina v. Fletcher*, 522 U.S. 118, 118 S. Ct. 502, 509 (1997); *Imbler*, 424 U.S. at 431 n.33; *Spivey v. Robertson*, No. 98-30595, 1999 WL 1115447, at *3 (5th Cir. 1999). Furthermore, actions taken to initiate prosecution "must include the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at the trial or before a grand . . . ." *Buckley*, 509 U.S. at 273. The label "investigative," in other words, must be tempered by the critical question of whether the function performed is fact gathering, a typical function of the police, versus fact analysis, a typical function of the prosecutor. See *id.* There is no particular time at which absolute immunity begins. Only the function performed determines whether a prosecutor is entitled to absolute rather than the qualified immunity.

1. Defendant Euresti

In order to determine whether Defendant Euresti is entitled to absolute immunity, the Court will analyze Plaintiff's claims. Plaintiff alleges several claims against Defendant Euresti — § 1983, conspiracy to violate civil rights; false imprisonment; abuse of process; slander; and intentional infliction of emotional distress.

Plaintiff, though given ample opportunity, does not state a § 1983 claim against Defendant Euresti. None of the actions

Plaintiff attributes to Defendant Euresti can be called investigative. Rather, the meetings with potential expert witnesses and the so-called mock up provided for Mr. MacDonell are within the evaluative process that a prosecutor would conduct before proceeding to either trial or a grand jury for indictment. The claims that Defendant Euresti suppressed exculpatory evidence do not allege actions that can be characterized as investigative or administrative. Furthermore, as discussed *infra*, none of these functions were performed before the probable cause stage.

Though the facts of this case are similar to those in *Buckley*, there are significant differences which lead to a different outcome. In *Buckley*, the police did not have probable cause to suspect the defendant of committing the crime. Moreover, the prosecutors engaged in an investigation of the crime and assembled a grand jury, not to return an indictment, but to investigate the crime. In the instant case, the police had probable cause to arrest Plaintiff almost from the time they arrived on the scene. Defendant Euresti and the other prosecutors engaged themselves in the process of evaluating the evidence to be presented to a grand jury for indictment. Because Plaintiff fails to state a claim to allege non-conclusory facts to support a claim that the prosecutors performed investigative, non-prosecutorial functions, Defendant Euresti is entitled to absolute immunity.

In her second claim against Defendant Euresti, Plaintiff alleges a conspiracy to violate civil rights. That the alleged violations may have been performed in concert and agreement with others does not deprive Defendant Euresti of immunity. Furthermore, if Defendant is immune from the § 1983 lawsuit, he is also immune from suit based on conspiracy to commit a civil rights violations. *See Pfannstiel v. City of Marion*, 918 F.2d 178 (5th Cir. 1990) (abrogated on other grounds). Thus Defendant Euresti is absolutely immune from a claim of conspiracy to violate Plaintiff's civil rights.

Plaintiff also alleges state law claims of false imprisonment, abuse of process, and intentional infliction of emotional distress. Texas recognizes federal immunity law based on *Imbler* and affords prosecutors absolute immunity from tort action. *See Kimmel v. Leoffler*, 791 S.W.2d 648, 651 (Tex. App. — San Antonio 1990, writ denied) (disapproved on other grounds by *Ruiz v. Conoco, Inc.*, 868 S.W.2d 752 (Tex. 1993)). Therefore, the foregoing absolute immunity analysis is applicable to the state law tort claims.

Lastly, Plaintiff claims that Defendant Euresti committed slander. Apparently the alleged slanderous comments were made at press conferences. The United States Supreme Court clearly stated in *Buckley* that prosecutors are not entitled to absolute immunity for statements made to the press. Texas applies the same principle. *See Oden v. Reader*, 935 S.W.2d 470, 475 (Tex. App. — Tyler 1996, no writ); *see also Town of South Padre Island v. Jacobs*, 736 S.W.2d 134, 144 (Tex. App. — Corpus Christi 1986, writ denied) (op. on reh'g). Clearly, Defendant Euresti is not entitled to absolute immunity. However, because Plaintiff has not alleged what statements were made or the exact context in which they were made, the Court cannot determine whether qualified immunity or good-faith immunity might be applicable. Defendant Euresti is not entitled to immunity from the slander claim.

2. Defendants Cyganiewicz and Saenz

Plaintiff asserts a § 1983 claim and a conspiracy claim against both Defendants Cyganiewicz and Saenz. Plaintiff claims that Defendant Cyganiewicz committed the tort of intentional infliction of emotional distress. Against Defendant Saenz, Plaintiff claims false imprisonment. The factual claims against the Assistant District Attorneys do not differ from those against Defendant Euresti. For the same reasons expressed above, Defendants Cyganiewicz and Saenz are entitled to absolute immunity from suit on both the federal or state law claims.

B. Expert Witnesses

Plaintiff Mowbray alleges that the prosecution's two expert witnesses, Defendants Hesskew and Robertson, conspired to violate Plaintiff's civil rights and intentionally inflicted emotional distress. Although the two defendants have made slightly different arguments in their motions and briefs, the Court will consider their motions together.

Defendants Hesskew and Robertson are entitled to absolute witness immunity for the testimony they gave at Plaintiff's trial. *See Briscoe v. LaHue*, 460 U.S. 325 (1983). Even Plaintiff admits that Defendants are entitled to absolutely witness immunity. Moreover, the Court, though not having found Fifth Circuit precedent on point, finds persuasive case law from other circuits holding that absolute witness immunity protects the witness from civil suits alleging a conspiracy to commit perjury. *See, Hunt v. Bennet*, 17 F.3d 1263, 1267-68 (10th Cir. 1994); *see also Snelling v. Westhoff*, 972 F.2d 199, 200 (8th Cir. 1992). Thus to the extent that Plaintiff's allegations are derived from Defendants Hesskew or Robertson's testimony, Defendants are entitled to absolute immunity.

Plaintiff, however, argues that Defendants, rather than conspire to commit perjury, in actuality conspired to conceal exculpatory evidence and fabricate inculpatory evidence. Setting aside Plaintiff's conclusory assertions, her complaint alleges nothing more than a few meetings and an evaluation of the evidence. Certainly, Defendant Hesskew and Robertson's scientific methodology and reporting can be characterized as less than adequate. However, Plaintiff has not alleged any fact supporting a conspiracy to violate her civil rights.

C. Policy Officers

Officer Mauricio was the first officer to arrive at the scene and participated in some meetings involving the state's experts. Against Defendant Mauricio, Plaintiff alleges a § 1983 claim; conspiracy to deprive Plaintiff of her civil rights; false

imprisonment; abuse of process; malicious prosecution; and intentional infliction of emotional distress.

Defendant Mauricio filed a motion to dismiss and motion for summary judgment. Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The nonmoving party bears the burden of setting forth specific facts showing that there is a genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Existence of a factual dispute will not defeat a motion for summary judgment unless the disputed facts might affect the outcome of the lawsuit under the governing law. *See id.* at 247-48.

The moving party bears the initial burden of informing the Court of the issues and the evidence that supports summary judgment. *See Celotex*, 477 U.S. at 323. Then the burden shifts to the nonmoving party to establish the existence of a genuine issue of material fact and all justifiable inferences are drawn in favor of the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87 (1986). The nonmoving party must "come forward with 'specific facts showing that there is a genuine issue for trial.' " *Id.* at 586-87 (quoting Fed. R. Civ. P. 56(c)).

Reviewing the summary judgment evidence, Plaintiff has not produced competent summary judgment evidence to create a genuine issue of material fact concerning the § 1983 claim. Plaintiff has not produced any competent summary judgment evidence showing that Defendant Mauricio knew of any exculpatory material.

Plaintiff alleges Defendant Mauricio knew of MacDonell's report; however, that report was produced before trial and there is no summary judgment evidence creating a fact issue about an attempt by Defendant Mauricio to conceal the report. Simply, there is no material issue of genuine fact

related to Plaintiff's § 1983 claim against Defendant Mauricio.

Plaintiff's conspiracy claim against Defendant Mauricio must also fail. Without a § 1983 violation, Plaintiff cannot allege a conspiracy violation. *See Pfannstiel,* 918 F.2d at 178.

Furthermore, Defendant Mauricio is entitled to official immunity for the state law claims alleged against her. "Government employees are entitled to official immunity from suit arising from the performance of their (1) discretionary duties in (2) good faith as long as they are (3) acting within the scope of their authority." *City of Lancaster v. Chambers,* 883 S.W.2d 650, 653 (Tex. 1994). The second element is at issue. The question is whether a reasonable official could have believed his or her conduct to be lawful in light of clearly established law and the information possessed by the official at the time the conduct occurred. *See id.* at 656. Even had Defendant Mauricio known of MacDonnel's initial conclusions or the contents of the report he would subsequently write, there is no competent summary judgment evidence that Defendant Mauricio acted with anything other than good faith. In light of the fact that MacDonnel's report was produced, a reasonable official could hardly be asked to do more. Defendant Mauricio is entitled to official immunity for the state law claims.

D. Cameron County

Having granted Defendant Cameron County's motion to dismiss with respect to the intentional tort claims, the Court addresses the County's motion to dismiss the federal claims.

Defendant Cameron County is not liable under § 1983. Defendants Euresti, Cyganiewicz, and Saenz were performing prosecutorial as opposed to administrative or ministerial functions. Interviewing expert witnesses and evaluating evidence to be presented either to a grand jury or at trial is an integral part of the prosecutorial function of enforcing state criminal law. Therefore, the prosecutors were acting on the

state's behalf. Cameron County is not liable, even had the prosecutors actually engaged in unconstitutional conduct. *See Esteves v. Brock*, 106 F.3d 674, 77-78 (5th Cir. 1997). Moreover, because the Court finds that the other Defendants are entitled to immunity, the County is not liable to Plaintiff.

E. Defendants Margo and James Mowbray

1. Defendant Margo Mowbray

Plaintiff claims that Defendant Margo Mowbray was unjustly enriched and a constructive trust should be issued. The Court takes judicial notice of the case, *Jeanne N. Mowbray v. Metropolitan Life Ins. Co. and Fredda Sue Mowbray*, Civil Action B-88-107.[1] In that case, the deceased's mother was awarded the benefits of insurance policies. Plaintiff Mowbray, having been convicted of the deceased's murder, was not entitled to benefit from the policies. Subsequent to her acquittal, Plaintiff moved that Court to vacate its earlier judgment and order the return of the insurance funds previously awarded to Jeanne Mowbray. In short, the Court vacated the judgment and denied all other requested relief including the creation of a constructive trust. This issue has been decided against Plaintiff, and this Court will not review the decision in place in *Jeanne N. Mowbray*, Civil Action B-88-107.

2. Defendant James Mowbray

For the foregoing reasons, Plaintiff's claim of unjust enrichment and request for constructive trust against Defendant James Mowbray do not state a claim for which relief may be granted in this Court.

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[1] The Court, in an earlier order, declined to take judicial notice of the earlier case until Defendant James Mowbray filed a certified copy of the final judgment in that case. The Court recognizes that Mr. Mowbray attempted to make such an offer at the hearing held on December 20, 1999. Therefore, the Court takes judicial notice of B-88-107.

Plaintiff, however, also asserts the conspiracy claim against Defendant James Mowbray. Plaintiff fails to state a claim for conspiracy to violate civil rights. Ignoring conclusory allegations, at most the facts alleged show that Defendant James Mowbray took an active interest in the prosecution of his brother's alleged murderer.

Conclusion

Having reviewed the applicable law, the parties motions and briefs, the Court determines that Plaintiff fails to state a claim against any Defendant in this action. Only the slander claim against Defendant Euresti remains unresolved by the motions presently before the Court. The parties should complete discovery on this discrete issue as soon as practicable and submit motions for summary judgment no later than 90 days from the time this order is filed.

DONE at Brownsville, Texas, this 28 day of January 2000.

/s/ HILDA G. TAGLE

Hilda G. Tagle
United States District Judge

NO. 28,669-1

IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
CAUSE NO. 87-CR-1135-A

EX PARTE	**IN THE DISTRICT COURT OF CAMERON COUNTY, TEXAS**
FREDA S. MOWBRAY, A/K/A SUSIE MOWBRAY	**107TH JUDICIAL DISTRICT**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In this cause on June 28, 1995, the Court of Criminal Appeals in a par curiam order directed that the trial court order necessary affidavits or ho' ' hearings and make findings of fact and conclusions of lav upon three allegations that Applicant has made in her Ay plication for Writ:

1. The Applicant is "actually innocent" under the standard of State Ex Rel *Holmes v. Third Court of Appeals*, 885 S.W.2d 389 (Tex Crim App 1994);

2. The State knowingly presented perjured testimony; and

3. Trial counsel was ineffective in failing to investigate the original findings of the State's expert which would have supported the defense theory in the case.

This Judge reviewed the record[1], and on August 22, 1995, conducted a hearing at which the State and the accused

[1] I suffer the disadvantage of not hearing and observing the witnesses at trial and must rely on the record. The trial judge in this case was Gilberto Hinojosa who has since left the bench and is County Judge of Cameron County. The present Presiding Judge of the 107th District, Benjamin Euresti, Jr., was District Attorney at trial and prosecuted this case.

offered evidence. Based upon a study of the record and the evidence offered at the evidentiary hearing the Court makes the following findings and conclusions:

FINDINGS OF FACT

1. In June 1988 the Jury convicted the Applicant, Fredda S. Mowbray, a/k/a Susie Mowbray of the murder of her husband, William A. Mowbray. The Jury assessed punishment at life imprisonment.

2. Applicant's conviction was affirmed in 1990 by the Thirteenth Court of Appeals, *Mowbray v State,* 788 SW2d 658 (Tex. App. — Corpus Christi, 1990, pet. ref.)

3. The State's case was based on circumstantial evidence except for a taped interview of the Applicant by the investigating officers placed in evidence by the State. The tape was largely exculpatory and supported Applicant's version of the shooting.

4. The decedent died of a single massive close range wound to the right temple as the he lay in bed with his wife.

5. The State's theory was that Appellant shot her husband while kneeling on the bed or standing by the bed, holding the gun in close range or contact with his right temple.

6. The Defense theory was that recounted by the Applicant in the taped interview: Her husband's death was suicide or an accidental discharge of the pistol at the moment when, awakened by his movement next to her, she, still prone in bed, reached up and touched his elbow and the pistol discharged. Her position in, on or beside the bed when the gun was fired was critical to both the State's and Applicant's case.

7. There was rationale for both murder and suicide. The State theorized the husband was murdered for life insurance proceeds offering evidence that Applicant had asked the status of his life insurance some weeks before the shooting.

8. The rationale for suicide was, at least, equally persuasive. The decedent owned a General Motors automobile dealership that almost certainly would have soon failed. Decedent has been "double floor planning" his automobiles with different banks, the revelation of which would in all probability result in his criminal prosecution. The Internal Revenue Service days before had taken the last formal step prior to referring the matter to the Department of Justice for prosecution of the decedent for tax evasion. Every effort to secure additional financing for the dealership had failed. Decedent's friend and the general manager of the dealership had resigned and was moving to another city within two or three days. The decedent had attempted suicide at least twice prior to his death and had shot himself in one of these previous efforts. Decedent had vowed to kill himself rather than face jail for tax evasion or commercial fraud.

9. The Jury was apparently convinced by the State's view of the physical evidence to which the State devoted much of its closing arguments[2]: (1) There was no blood or brain matter on the decedent's hand as there should have been had he fired the fatal shot; and (2) There was on the front of Applicant's night gown a pattern of high velocity impact spatter (HVIS) that disproved her claim that she was prone in the bed, and instead was either kneeling on the bed or leaning over the side of it at the time the fatal wound was inflicted.

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[2] Applicant sets out the State's arguments at pages 7-10 of her proposed findings and conclusions.

10. Actually the absence of blood and brain matter was a wash. If a suicide or accident, blood and brain matter should have been on decedent's hand that held the firearm; there was none at autopsy[3]. Equally true, as the State's pathologist testified, had Appellant been holding the firearm, large amounts of blood and brain matter should have been on the sleeve of her night gown. There was none.

11. The linchpin of the State's case was the high velocity impact spatter (HVIS) allegedly found on the front of her gown. If there, she could not have been prone in the bed at the time the shot was fired, and it followed her version of events was false.

12. The State's evidence as to HVIS on Appellant's gown came from the State's expert witness, Dusty-Hesskew, an Austin detective. He testified as to finding a pattern of HVIS on the gown that he was able to replicate kneeling on a bed and firing into a dummy (S.F. 944). Based on this finding he testified in his opinion the deceased did not commit suicide. He avoided saying it was murder (S.F. 948). In a post trial deposition he seemed to change his opinion to murder or accident (Writ 333-334).

13. At our August evidentiary hearing Hesskew recanted his trial testimony as to HVIS. Hesskew admitted his testimony at trial was without "scientific validity" (Writ 134).

14. Saying that the test he conducted for HVIS was presumptive and required that there be a prior confirmatory test for blood, and now learning there had been no confirmatory test,[4] Hesskew disavowed virtually the whole of his trial testimony (Writ 120-128).

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[3] No one seemed to recall with certainty whether they had seen the condition of the hand prior to the autopsy.

[4] DPS Chemist Robertson testified that he had tested the stains for blood and the test was negative (Writ 240)

15. The Defendant's expert, Tom Bevel, confirmed that the validity of his testimony at trial had been based upon Mr. Hesskew's assurance to him on two occasions that the spatter on the gown had been confirmed as blood, statements that Hesskew now denies. Bevel, too, disavowed his trial testimony (Writ 139, 152).

16. Without Hesskew's testimony, and the conclusions he drew, there was another equally reasonable hypothesis other than the Applicants guilt: Mowbray's death was suicide or an accident. However, the matter does not rest here. The facts relating to Herbert Leon MacDonell now loom large.

17. The State's conduct in connection with MacDonell was, at best, questionable trial strategy, and, at worst, intentional deception of Applicant's counsel.

18. Herbert Leon MacDonell of Corning, New York is a preeminent authority in the science of blood stains and their significance. No one in our case disagreed with this assessment of him. Hesskew, testified that MacDonell was the "father" of the HVIS test (Writ 299).[5] Both Hesskew and Defendant's expert, Bevel, had studied under MacDonell at his Corning institute. There seemed to be little question that Hesskew and Bevel would readily accede to MacDonell's

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[5] At trial Hesskew was asked:

Q: Who is Herb MacDonald (sic)?

A: Herb McDonald (sic) is basically what we call the inventor of blood-stain analysis. He began the study in 1977 under a federal grant from the Washington Bureau of Justice.

Q: Is it true that Mr. McDonald (sic) is the only one who has written a thesis on blood spatter? Did he have anything to do with that?

A: Yes, sir.

Q: Is he recognized as "the" expert in the world, even?

A: Yes, sir. He teaches school all over the world, in Australia, Japan, German. He has a fellowship, I believe from Scotland Yard.

Q: An that's who you trained under in Corning?

A: Yes, sir, that's correct. (S.F. 921-922)

opinions. Indeed, Hesskew did just that at the evidentiary hearing.

19. On November 18, 1987, following the August shooting and seven months before trial, District Attorney Euresti and Assistant District Attorney Cyganiewicz went to Corning, New York, and employed MacDonell as a State's expert.

20. In Corning the prosecutors furnished MacDonell with photographs and the white night gown worn by Appellant at the time of the shooting. Shortly afterwards MacDonell came to Brownsville and viewed all the physical evidence. On his laboratory work sheet, dated November 18, when the State's counsel were in Corning, MacDonell made the entry:

    "Night gown has no pattern of high velocity impact spatter" (Writ 248).

On a billing submitted to the State by MacDonell there is a charge of $500.00 for "18 Nov 87 Conference in Corning, New York, to examine *and discuss* certain physical evidence." (Writ 255) There seems to be no question that on November 18, 1987, seven months before trial, the State's knew MacDonell's findings and that they were exculpatory.

21. A Brady motion was filed February 1, 1988, and heard at pretrial, March 1, 1998. At that hearing Assistant District Attorney Cyganiewicz said:

    "Of course, everything that is exculpatory has to be turned over, and we will."

    and in answer to the Court's question as to exculpatory material he said:

    Yes, sir. We've already given the statement by the defendant which may very well be exculpatory. Anything else, he's entitled to exculpatory materials and I'll sift through the file and obtain those files (sic), Your Honor.

22. Even as he spoke Cyganiewicz knew MacDonell's conclusions and the lab work sheet entries. He surely knew little could be more exculpatory in view of the State's theory of the case. At the pretrial Cyganiewicz made no disclosure of MacDonell's findings and his lab work sheet. The parties agreed on the record that all such disclosures would be made prior to or on March 11.

23. The State made no disclosures of MacDonell and his findings by the March 11 deadline. It was only after Appellant's counsel confronted State's counsel in the chambers of the trial judge some twelve days before trial, with the judge threatening the State with sanctions, that the State agreed to furnish MacDonell's written report. It was eight to ten days before trial when the State actually furnished Applicant such report[1]. The State continued to represent that it would be calling MacDonell as a witness.

24. The length to which the State went to withhold from defense counsel the substance of McDonell's exculpatory testimony may be found at pages 209-210 of the Writ transcript. At one point the State's counsel told the judge "... it is hard to get in touch with (MacDonell)", a representation made questionable by the fact the State days later was able to produce a written report from MacDonell.

25. Abel Toscano, lead counsel for Appellant, believed, even after the trial began, that MacDonell would be present and testify. In this Court's view he was entitled to rely on the State's subpoena for MacDonell for such a conclusion. Needless to say the State did not call MacDonell and he apparently remained in Corning.

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[1] MacDonell's written report will be found in Writ Vol. II pp 260-261.

26. Toscano testified that he made no effort to contact MacDonell because he was an employed expert of the State and under local custom he, Toscano, would have had to secure the State's permission to talk to him. It was, he said, the local practice not to try to interview the opponents employed experts.

27. Toscano did not recognize MacDonell's outstanding credentials nor the unquestionable impact and import of MacDonell's opinion. Toscano had employed Oklahoma City Police Captain Bevel as his expert. He was of the mistaken opinion that Bevel's testimony would be sufficient to refute Hesskew. The late hour at which the State finally produced MacDonell's report undoubtedly contributed to Toscano's making this mistaken judgment call.

28. This Court heard and observed MacConnell as well as Haskew and Bevel. MacConnell was far and away the more articulate, knowledgable and credible. If the jury had heard MacDonell, and Hesskew had testified as he now does, or not testified at all, there is a substantial probability a verdict of Not Guilty would have ensued.

29. The court finds as true, and, without setting them out here, adopts Applicant's proposed findings of fact number 6, 11, 12, 13, 14, 17, 19, 36, 38, 51, 55, 56, 66, 76, 77, 78, 79 and 81.

CONCLUSIONS OF LAW

1.

"ACTUAL INNOCENCE"

In this case the "newly discovered evidence" was a newly discovered absence of evidence. All Hesskew's and Bevel's opinions were valid only if there had been a prior confirmation of blood before their presumptive tests. Unknown to everyone, with the exception of DPS Chemist Robertson, there had been no such confirmation.

Such "newly discovered evidence" meets Judge Maloney's threshold standard in *Ex Parte Graham*, 853 SW2d 565, 567: The newly discovered evidence created a doubt as to the efficacy of the verdict to the extent that it undermined confidence in the verdict, and it is probable that the verdict would be different.

However, the facts developed in these proceedings fall short of the Holmes and Herrera standard, i.e. based on the proferred newly discovered evidence and the entire record before the jury that convicted him no rational trier of fact could have found proof of guilt beyond a reasonable doubt.

2.

PERJURED TESTIMONY

The Court finds no perjury, making a distinction between perjured testimony and testimony false because it was unknowingly based on false assumptions. If perjury ~~is a false~~ statement knowingly made with intent to deceive, and with knowledge of the statements meaning, and it is, neither Hesskew nor Bevel committed perjury.

Hesskew's and Bevel's stated opinions that the microscopic stainings on the gown were high velocity impact spatters and the "reconstruction" of the crime based on that belief were without scientific validity, but not perjury.

It follows it that the State did not knowingly offered perjured, or even false, testimony, unless it can be said that the collective knowledge of the score or more State's investigators and experts, including DPS Chemist Robertson, is to be imputed to the State's attorneys.

3.

INEFFECTIVE COUNSEL

Applicant's counsel were not ineffective. They vigorously defended their client in a wholly professional manner. How-

ever, their effectiveness was, in large measure, thwarted by the conduct of the State.

Applicant's trial counsel may be faulted in hindsight for mistakes in judgment, but they were not ineffective. Undoubtedly, if Appellant's counsel had insisted that the State produce its subpoened witness MacDonell, and had examined him, a different verdict might have resulted. But Applicant's counsel could not have known the devastating testimony MacDonell would have given (and did give at the writ hearing). They knew nothing more than what MacDonell had said in his written report of May 13 (Writ 260-261).

On the other hand State's counsel early on recognized the potential lethal effect of MacDonell's testimony on their theory of the case, and beginning in November and continuing until May they engaged in a deliberate course of conduct to keep MacDonell's findings and opinions from Applicant's counsel until the last days before trial. Even then they caused Applicant's counsel to believe MacDonell would be a witness and available for cross examination (Writ 211-214).

The State had an obligation to be forthcoming when the Brady motion was heard and granted in March. Instead, it chose to suppress MacDonell's exculpatory evidence until its hand was forced by the trial judge only days before trial, and, in so doing, the State denied Applicant due process.

Paraphrasing Judge Berschelmann in *Ex Parte Brandly,* 781 SW2d 886, 894 (Tex Cr App 1989): The cumulative effect of the State's . . . conduct, judged by the totality of the circumstances resulted in the deprivation of Applicant's right to due process by suppressing evidence favorable to the accused . . .

It is this Court's opinion that fundamental fairness requires Applicant's conviction be set aside and she be granted a new trial.

Signed for entry this 30th day of November, 1995.

/s/ HESTER
Judge Presiding

Court of Criminal Appeals of Texas,
en Banc.

Ex Parte Freda S. Mowbray a/k/a Susie Mowbray.

No. 72624.

Dec. 18, 1996.

Rehearing Denied Feb. 12, 1997.

Following conviction for murder, defendant petitioned for habeas corpus. The Court of Criminal Appeals, Baird, J., held that state's knowing failure to disclose blood splatter expert's report supporting defense theory that deceased committed suicide warranted new trial.

Granted.

McCormick, P.J., filed dissenting opinion in which Mansfield and Keller, JJ., joined.

Keller, J., filed dissenting opinion in which Mansfield, J., joined.

WEST HEADNOTES

[1] Habeas Corpus 845

In habeas hearings, judge determines credibility of witnesses and if habeas judge's findings of fact are supported by record, they should be accepted by Court of Criminal Appeals.

[2] Constitutional Law 268(5)

State has affirmative duty to disclose favorable evidence under due process clause. U.S.C.A. Const.Amend 14.

[3] Criminal Law 700(2.1)

To warrant new trial, favorable evidence undisclosed by state must also be material. *U.S.C.A. Const.Amend. 14.*

[4] Criminal Law 700(3)

[4] Habeas Corpus 480

State's knowing failure to disclose blood splatter expert's report supporting defense theory that deceased committed suicide warranted new trial on murder charge. *U.S.C.A. Const.Amend. 14.*

Robert Ford, Fort Worth, for appellant.

John A. Olson, Robert Moore, Asst. District Attorneys, Brownsville, Matthew Paul, State's Atty., Austin, for State.

Before the court en banc.

OPINION

BAIRD, Judge.

Applicant was convicted of murder and sentenced to confinement for Life and a $10,000.00 fine. The Court of Appeals affirmed. *Mowbray v. State,* 788 S.W.2d 658 (Tex.App. — Corpus Christi 1990). Her habeas application contends: she is actually innocent of murder; the State's expert knowingly gave false and misleading testimony; the State knowingly used false testimony; and, she suffered ineffective assistance of counsel at trial. The habeas judge entered findings of fact and conclusions of law, recommending that we grant a new trial. We will grant relief.

I.

The evidence at trial was summarized by the Court of Appeals as follows:

> The deceased was shot in bed at night. The only occupants of the room in which the shooting occurred were the deceased and [applicant].
>
> The defense theory was that [applicant] and the deceased were lying in bed with a pillow barrier between them when [applicant] saw the deceased's elbow point upward. When

she reached to touch it, the gun went off. [Applicant] made a taped statement about the shooting, and the tape was admitted into evidence. Witnesses to the [applicant's] statements recalled that [applicant] indicated that she had used her left hand to reach toward the deceased. The State, however, introduced a crime lab supervisor's analysis of [applicant's] nightgown showing traces of lead or gunshot residue on the lower right sleeve. That witness, Steve Robertson, conducted tests with the gun found at the scene and opined that the residue was consistent with someone firing that gun.

Estella Mauricio, who was dispatched to the Mowbray residence just after the shooting, testified that she found the deceased, still alive and shot through the head, lying on his left side and covered all the way up to his shoulder. The bullet had entered the right side of his head, exited to the left, and wounded his left hand, which was under his head with a pillow between his head and left hand. The right hand was lying across his chest under the covers. There was no blood or brain matter on the right hand and she did not ever see his hand being washed at home or at the hospital. Emergency technician Cavazos also recalled that the victim was completely covered, with only the right side of his face and the top of his head showing, when he arrived. Mauricio testified that he was positioned like a sleeping person, and the deceased's first cousin, Scott Mowbray, testified that the deceased slept in the position in which he was found.

Dr. Dahm, who conducted the autopsy, stated that if the deceased had shot himself, his right hand would have been covered with blood and brain matter. He found no such blood or brain matter on the deceased's right fingers, hand, or forearm. Dahm testified it would have been impossible for the deceased to have shot himself and the hand to be clean, and concluded that the death was a murder . . .

Id., 788 S.W.2d at 662-663.

Additionally, two blood spatter experts testified. Sergeant Dusty Hesskew, of the Austin Police Department testified on behalf of the State and Captain Tom Bevel of the Oklahoma City Police Department testified on behalf of applicant. Generally, blood spatter experts inspect the physical evidence to determine the injuries suffered and their location with respect to the other physical evidence. In the instant case, both experts examined applicant's nightgown for "high velocity impact [blood] staining" which commonly occurs within a short distance from a contact gunshot wound. Hesskew testified that he identified and measured, through "luminol testing," high velocity impact bloodstains on applicant's nightgown, which were invisible to the naked eye. Hesskew concluded the cause of death in the instant case was probably homicide. Bevel testified that his examination of the physical evidence led him to conclude the deceased could have died in the manner in which applicant testified, i.e., suicide.

II.

Pursuant to our order, the habeas judge conducted a hearing on the instant application. At that hearing, a third blood spatter expert, Herbert Leon MacDonell, the director of an independent forensic laboratory in Corning, New York, testified. MacDonell is viewed as the pre-eminent authority on the science of blood spatters.[1] MacDonell was retained to review the photographs and physical evidence in the instant case by the Cameron County District Attorney's office approximately seven months prior to trial. MacDonell's examination of applicant's nightgown revealed no blood stains

[1] The State's expert, Dusty Hesskew, studied under MacDonell and testified elsewhere that MacDonell "basically invented" blood spatter analysis. Indeed, during Bevel's cross-examination, the State sought agreement that MacDonell "is THE expert or THE granddaddy of blood spatter."

either visible to the naked eye or under a microscope. MacDonell concluded: "[I]t is very unlikely that [applicant's nightgown] was in close proximity to the victim's gunshot wound at the time of his shooting, or it was protected from spatter in some manner if [it] were." After reviewing the crime scene, the physical evidence and the photographs, MacDonell's expert opinion was that *it was more probable than not that the deceased died from a suicide rather than a homicide.* At the request of the State, MacDonell prepared and mailed to the Cameron County District Attorney a written report of his findings approximately two weeks before trial.

MacDonell took issue with Hesskew's use of luminol to measure blood spattering. Luminol is a substance which can react with blood that is invisible to the naked eye. However, luminol testing is not accepted as a positive test for blood. Luminol testing is merely presumptive because luminol reacts with substances other than blood. In MacDonell's opinion, the luminescence from a luminol reaction cannot be accurately measured. He stated:

I think it would truly be an exercise to futility. I don't think you can put any reliability on it — I certainly wouldn't — and I've seen luminol sprayed many times. I've never heard of anyone trying to measure it, count it, other than saying there appears to be a dozen or more ... You could do it, but the validity of your conclusion would be highly suspect in my opinion.

In MacDonell's view, Hesskew did not understand the chemistry behind luminol testing.[2]

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[2] MacDonell further testified: It's uncomfortable to criticize other people who are practicing in the field that I have been quite responsible for bringing to the front of the current investigative systems in the United States, if not the world, but I must say in one word that I'm disappointed. I will leave it at that.

Hesskew testified he was retained by the Cameron County District Attorney's office as a blood spatt expert. He observed applicant's nightgown at the Department of Public Safety laboratory prior to the time it was shown to MacDonell. Hesskew was present when the nightgown was treated with luminol. He counted forty-eight small stain areas around the stomach and chest of the nightgown which appeared consistent with high-velocity stains. Hesskew further donned a similar nightgown and fired test shots into a CPR dummy's head filled with blood in an attempt to duplicate the staining he observed through the luminol testing. Although Hesskew could not remember how he was able to duplicate the blood staining, in his expert opinion, applicant, wearing her nightgown, could not have been laying beside her husband at the time of his death. Thus, Hesskew's testimony contradicted applicant's defensive theory.

Hesskew admitted that his testimony at trial included several assumptions which involved more than his own test results. Most important of these assumptions was that *someone tested the invisible stains and determined them to be human blood.* At the hearing on the instant habeas application, Hesskew conceded his trial testimony was *scientifically invalid* because no such confirmation was ever made. In other words, Hesskew conceded that his ultimate opinion that the victim died as a result of a homicide, and that applicant's statements were impossible, had *no* scientific basis.

Bevel testified that it is impossible to measure high velocity impact blood spatter in the manner utilized by Hesskew. Bevel, like Hesskew, only performed *presumptive* tests on applicant's nightgown. Bevel did not conduct any confirmation tests because he was informed by Hesskew that the Department of Public Safety laboratory confirmed human blood on applicant's nightgown. Because his trial testimony was based upon this erroneous premise, Bevel stated: "with the inability to determine that ... is blood that is there, especially since we are talking about blood that is only

invisible to the unaided eye, I don't think you can really say anything." Bevel believed the failure to conduct confirmation tests undermined his examination and earlier testimony, and agreed with Hesskew that their trial testimony was *scientifically invalid.*

Steve Robertson, a chemist in the Texas Department of Public Safety (DPS) crime laboratory, testified that he examined applicant's nightgown and was present on three different occasions when the nightgown was sprayed with luminol. The nightgown was also sprayed with three chemicals to determine the presence of lead residue and treated with heat and chemicals to determine the presence of gunshot residue. His examination of the nightgown revealed very small red stains, visible to the naked eye, lead residue and a yellowish stain. Robertson conducted two confirmatory tests on the red stains to determine if they were human blood. *Both tests resulted in negative results.* Robertson testified that, if the stains were blood, the tests for the gunshot residue could have destroyed the protein in the blood and would cause a negative reaction. Further, the chemicals sprayed on the nightgown could have diffused or dissolved the red stains to the extent they were undetectable without a microscope.

Ed Cyganiewicz, the lead prosecutor at trial, conceded that the State's case "depended upon" the blood spatter evidence. Cyganiewicz testified that MacDonell was retained by the Cameron County District Attorney's office as an expert for the State and a subpoena was issued to secure his testimony. According to Cyganiewicz, the State did not call MacDonell to testify because of the expense of securing this testimony. However, because of the possibility of MacDonell's report being *"Brady* material," a copy was forwarded to applicant's trial attorney ten days to two weeks prior to trial.

Abel Toscano, a board certified criminal law specialist, had been a criminal defense attorney in Cameron County for forty-two years and was retained to represent applicant at

trial. Toscano received a copy of MacDonell's report shortly before trial after the trial judge threatened Cyganiewicz with sanctions. After discussing the matter with co-counsel and Bevel, and reviewing MacDonell's report, the evidence he had gathered independently, including the statements and information he obtained from applicant, Toscano chose not to contact MacDonell because he (Toscano) did not know how MacDonell would respond and there was some chance MacDonell might change his opinion. However, Toscano did make notations in preparation of a cross-examination of MacDonell, and during trial had his assistants checking to see if MacDonell had arrived.

III.

Following the hearing the habeas judge entered findings of fact and conclusions of law. The habeas judge determined that applicant was not factually innocent under *State ex rel. Holmes v. Honorable Court of Appeals for Third District,* 885 S.W.2d 389 (Tex.Cr.App.1994); that, although the State's expert's testimony was scientifically invalid, it was not perjurious; and, that applicant's trial counsel was not ineffective. Nevertheless, the habeas judge determined that applicant was denied due process. Among the habeas judge's findings of fact are:

7. There was rationale for both murder and suicide. . . .

8. The rationale for suicide was, at least, *equally persuasive*. . . . The decedent had attempted suicide at least twice prior to his death and had shot himself in one of these previous efforts. Decedent had vowed to kill himself.[3] . . .

11. The linchpin of the State's case was the high velocity impact spatter (HVIS) alleged found on the front of her gown. If there, [applicant] could not have been prone in

[3] All emphasis is supplied unless otherwise indicated.

the bed at the time the shot was fired, and it followed her version of events was false.

13. At [the habeas hearing] Hesskew *recanted* his trial testimony as to HVIS. Hesskew admitted his testimony at trial was without *"scientific validity."*

15. . . . *Bevel, too, disavowed his trial testimony.*

16. Without Hesskew's testimony, and the conclusions he drew, there was another equally reasonable hypothesis other than Applicants guilt: Mowbray's death was suicide or an accident. However, the matter does not rest here. The facts relating to Herbert Leon MacDonell now loom large.

17. The State's conduct in connection with MacDonell was, at best, questionable trial strategy, and, at worst, intentional deception of Applicant's counsel.

20. . . . On [MacDonell's] laboratory work sheet, dated November 18, when the State's counsel were in Corning, MacDonell made the entry:

"Night gown has no pattern of high velocity impact spatter"

On a billing submitted to the State by MacDonell there is a charge of $500.00 for "18 Nov 87 Conference in Corning, New York, to examine *and discuss* certain physical evidence." There seems to be no question that on November 18, 1987, seven months before trial, the State's [counsel] knew MacDonell's findings and that they were exculpatory. [Emphasis in original.]

28. This Court heard and observed MacDonell as well as Hesskew and Bevel. *MacDonell was far and away the more articulate, knowledgeable, and credible.* If the jury had heard MacDonell, and Hesskew had testified as he now does, or not testified at all, *there is a substantial probability a verdict of Not Guilty would have ensued.*

Under these facts, the habeas judge determined the State violated applicant's due process right to a fair trial by suppressing evidence favorable to applicant. Indeed, the habeas judge concluded:

> Applicant's counsel were not ineffective. They vigorously defended their client in a wholly professional manner. However, *their effectiveness was, in large measure, thwarted by the conduct of the State.* . . . Undoubtedly, if [Applicant's] counsel had insisted that the State produce its subpoenaed witness MacDonell, and had examined him, *a different verdict might have resulted.* But Applicant's counsel could not have known the devastating testimony MacDonell would have given (and did give at the writ hearing). They knew nothing more than what MacDonell had said in his written report of May 13.
>
> On the other hand State's counsel early on recognized the potential lethal effect of MacDonell's testimony on their theory of the case, and beginning in November and continuing until May *they engaged in a deliberate course of conduct to keep MacDonell's findings and opinions from Applicant's counsel until the last days before trial. Even then they caused Applicant's counsel to believe MacDonell would be a witness and available for cross-examination.*
>
> The State had an obligation to be forthcomingwhen the Brady motion was heard and granted in March. Instead, *it chose to suppress MacDonell's exculpatory evidence until its hand was forced by the trial judge only days before trial, and, in so doing, the State denied Applicant due process.*

Thus, the habeas judge recommends that we set aside applicant's conviction and order a new trial.

IV.

[1] Virtually every fact finding involves a credibility determination. We have repeatedly recognized that the fact finder is the exclusive judge of the credibility of the wit-

nesses. *See e.g., DuBose v. State,* 915 S.W.2d 493 (Tex.Cr.App.1996); *Joseph v. State,* 897 S.W.2d 374 (Tex.Cr.App.1995); *Muniz v. State,* 851 S.W.2d 238 (Tex.Cr.App.1993); *Bonham v. State,* 680 S.W.2d 815, 819 (Tex.Cr.App.1984); *Mills v. State,* 508 S.W.2d 823, 826 (Tex.Cr.App.1974); *Esquivel v. State,* 506 S.W.2d 613 (Tex.Cr.App.1974); *and, West v. State,* 489 S.W.2d 597 (Tex.Cr.App.1973). In habeas hearings, the judge determines the credibility of the witnesses and if the habeas judge's findings of fact are supported by the record, they should be accepted by this Court. *Ex parte Turner,* 545 S.W.2d 470, 473 (Tex.Cr.App.1977). *See also, Ex parte Adams,* 768 S.W.2d 281, 288 (Tex.Cr.App.1989).

In *Ex parte Moore,* 136 Tex.Crim. 427, 126 S.W.2d 27 (1939), we stated:

> ... Where the ruling of the trial judge depends upon the existence or non-existence of a certain fact and testimony pro and con is introduced thereon and the evidence is conflicting it becomes the duty of the trial judge to determine the issue, *and unless it appears to this court that his finding was without support in the evidence,* and that he had committed an error in his judgment thereon, *we would not interfere with his findings thereon. Glenn v. State,* 89 Tex.Cr.R. 13, 229 S.W. 521.

Id., 126 S.W.2d at 28.

[2][3] The State has an affirmative duty to disclose favorable evidence under the Due Process Clause. *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-1197, 10 L.Ed.2d 215 (1963). However, in order to warrant a new trial, the favorable evidence must also be material. *Ex parte Castellano,* 863 S.W.2d 476, 485 (Tex.Cr.App.1993).[4]

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[4] In *Thomas v. State,* 841 S.W.2d 399, 404 (Tex.Cr.App.1992), we held: ... [T]he Due Process Clause of the Fourteenth Amendment is violated when a prosecutor fails to disclose evidence which is favorable to the

[4] In the instant case, the habeas judge determined the State knowingly suppressed MacDonell's report which supported applicant's theory of suicide. This was obviously favorable evidence. Additionally, the habeas judge found that if the favorable evidence had been considered by the jury, an acquittal would have resulted. Clearly this finding meets the materiality requirement. *Id.*, 863 S.W.2d at 486.

The habeas judge's factual determinations are supported by the record and, therefore, will be accepted by this Court. *Turner*, 545 S.W.2d at 473. Consequently, we hold applicant's due process rights were violated, and applicant is entitled to relief. Accordingly, applicant's conviction is set aside and it is the order of this Court that applicant be returned to the Sheriff of Cameron County to answer the indictment.

Relief granted.

WHITE, J., not participating.

McCORMICK, Presiding Judge, dissenting.

I must respectfully dissent. In this case, the majority grants relief on this eight-year-old conviction by holding applicant's due process rights under the Fourteenth Amendment to the United States Constitution were violated when the State "suppressed" MacDonnell's report by furnishing it to applicant about two weeks before her 1988 trial began! Just to state the Court's holding is to refute it. The Court's holding as to this aspect of the case[1] is absurd and represents another inane exercise in judicial activism — i.e., finding so

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accused that creates a probability sufficient to undermine the confidence in the outcome of the proceeding.

[1] The Court's opinion fails to address the issues of cognizability and procedural default. Since this proceeding is a collateral attack on applicant's conviction approximately eight years after the fact, these are important issues which deserve serious consideration.

called "rights" in the United States Constitution that just do not exist.

I cannot add much more to Judge Keller's dissenting opinion which I also join. MacDonnell's report does not in any way impeach the most important evidence in this case establishing applicant's guilt — the absence of blood and brain matter on the victim's right hand, the position of the victim's body, and the presence of gunshot residue on the right sleeve of applicant's nightgown all of which were inconsistent with her defensive theory. See *Mowbray v. State,* 788 S.W.2d 658, 663 (Tex.App. — Corpus Christi 1990, pet ref'd), cert. denied, 498 U.S. 1101, 111 S.Ct. 999, 112 L.Ed.2d 1082 (1991). The evidence at applicant's 1988 trial amply supports a finding that applicant shot and killed the victim while he was asleep in bed, and MacDonnell's report fails to cast any serious doubt as to the reliability of this finding. I would hold applicant fails to present any cognizable claim for habeas corpus relief. Cf. *Herrera v. Collins,* 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993).

In addition, the basis of applicant's claims for relief in this proceeding has been known to applicant since about two weeks before her 1988 trial. However, she failed to raise these claims at the motion for new trial hearing following her 1988 conviction or during the direct appeal of her 1988 conviction. See *Mowbray,* 788 S.W.2d at 662-72, 669 (applicant filed motion for new trial claiming the State failed to produce the T-shirt the victim wore when shot).[2] Applicant has delayed approximately seven years before bringing her claims for relief in this proceeding. Under these circumstances, the State's and society's legitimate and valid interest in the finality of this obviously guilty applicant's conviction should outweigh granting applicant relief on any due process violation that allegedly occurred in connection with her 1988

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[2] One need only examine the Court of Appeals opinion affirming applicant's 1988 conviction to see that her conviction more than satisfies due process principles. See *Mowbray,* 788 S.W.2d at 662-72.

trial. Someone should be asking whether the State can get a fair trial after such a long passage of time, and whether applicant's delay in asserting her claims for relief in this proceeding constitutes a waiver of those claims.

I respectfully dissent.

MANSFIELD and KELLER, JJ., join this dissent.

KELLER, Judge, dissenting.

Applicant makes three claims in her effort to gain relief from her conviction. The trial court found that applicant was not entitled to relief on the basis of any of her three claims, but recommended relief anyway, determining that the State's suppression of favorable evidence denied applicant due process.

The majority's decision that applicant's conviction should be set aside rests upon the determination by the trial court that the State knowingly suppressed MacDonnell's report, and that if the jury had considered the report, there is a substantial probability applicant would have been acquitted.[1]

The record does not support the finding of the trial court that the State engaged in a deliberate course of conduct to keep MacDonnell's findings and opinions from defense counsel until the last days before trial. The prosecutor wrote twice to MacDonnell — in March and in April — to request him to forward his written findings. No report was sent. The report in question was not prepared by MacDonnell until May 13, 1988. The State then turned the report over to the defense immediately, ten days before the trial began on May 23, 1988.

Neither does the record support the finding that the State misled defense counsel by representing that it would produce MacDonnell at trial. Although the State retained MacDon-

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[1] The majority's statement that the trial court found that "an acquittal would have resulted" is inaccurate. Op. at p. 466.

nell and issued a subpoena for him, this was not shown to be a subterfuge to mislead counsel: the State did not get the final report until May of 1988 either.

But even if the record did support the trial court's finding that the State suppressed the report,[2] applicant would not be entitled to relief. Her attorney *did* know of the report before trial; he and his client made a tactical decision not to follow up on the report.

The full reasons for this decision are unknown to us for the sole reason that Applicant would not allow trial counsel to testify to all the reasons he decided not to use MacDonnell or the report.[3] Regarding the reasons Toscano did not use the report or MacDonnell, Toscano stated:

> There were a number of other factors. And if the Court will allow me to do so by — I would have to reveal some confidential information that I don't think is proper unless the Court orders me . . . I feel that I should be released of this confidentiality so as to bring forth before this tribunal the facts that we — that we — that you should know, what the bases were why I did not call Mr. — call or talk to him.

(Ellipses added.) The trial court responded that applicant had to waive the privilege. Applicant consulted with her attorney off the record, with the result that the privilege was not waived. Because applicant purposely kept from the trial court the full reasons that she and her attorney decided not to use the report or MacDonnell, we must assume that the decision was sound and that the defense did not consider the

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[2] Ordinarily, a due process claim relating to the suppression of favorable evidence does not apply where the defense obtained the evidence before trial. *Havard v. State*, 800 S.W.2d 195, 204-205 (Tex.Crim.App.1989) (opinion on original submission).

[3] Apparently, no one recognized that applicant had waived the attorney/client privilege when she alleged ineffective assistance of counsel. Toscano should have been allowed to testify as to the reasons for his decision regarding MacDonnell.

report to be favorable.[4] And if we make that assumption, there is no basis for concluding that the "suppression" of the report denied applicant due process or, indeed, had any deleterious effect on the trial at all.

MacDonnell's report was not the only matter in dispute at the writ hearing. Testimony at the hearing established that witnesses erroneously believed that a confirmatory test had been done on the nightgown after presumptive tests indicated the presence of blood. In fact, confirmatory tests had been done with negative results. The negative results did not necessarily indicate a lack of blood, but established only that if there was blood, the amount was too small to react or it had been degraded by previous forensic tests.[5]

Importantly, Hesskew's testimony that there was high velocity impact spatter was entirely unaffected by the fact that there was no positive confirmation that the substance on the gown was blood. That is, the pattern of the stain was caused by the atomization of the substance — whatever it was — produced when the surface tension of the substance was overcome by very high energy from, for example, a gunshot. There was testimony that high velocity impact spatter is associated ninety-nine times out of one hundred with gunshots, known otherwise to occur in traffic fatalities when a car was traveling at a high rate of speed. The victim's death was caused by a high energy contact gunshot to the head.

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[4] At least one of MacDonnell's conclusions contradicted applicant's statement to the police and her defensive theory: MacDonnell concluded that it was unlikely that the gown was near the wound at the time of the fatal blast. Applicant had admitted, however, that she was wearing the gown and was close to the victim.

[5] There was, in fact, a considerable amount of testimony that luminol tests and tests for gunshot residue could degrade the sample to the extent that it would not be possible to get a positive confirmation of the presence of blood.

Testing with luminol, with which the presumptive test was done, is relatively specific. That is, there is a limited number of substances with which it will react. There was testimony that luminol will react to blood, copper, iron, nickel, and bleach. There was also testimony that had the stain on the nightgown been a bleach stain it would not have been likely to produce the pattern that was on the gown.

The trial court's finding that Hesskew recanted his trial testimony as to HVIS is thus unsupported by the record except to the extent that Hesskew believed a confirmatory test for the nature of the substance on the gown had indicated blood. Likewise, the record does not support the finding that Hesskew disavowed virtually the whole of his trial testimony. Ultimately, the opinions he expressed at trial varied from his opinions at the writ hearing only in that he conceded that he did not prove to a scientific certainty that there was blood on the nightgown.

There was testimony at trial and at the writ hearing that red stains were observed on the nightgown, both microscopically and with the naked eye. There was evidence that the victim was found in his normal sleeping position, with his left hand under his head and a pillow between his knees, and that such a position would not be usual for a man who wished to commit suicide. There was no blood and brain matter on the victim's hand, as there should have been if he had held the gun. [6] There was testimony that the pattern of the stain on the nightgown was caused by high velocity impact spatter.

The trial court concluded that applicant failed to prove her claims of "actual innocence," ineffective assistance of counsel, or perjured testimony. These findings are supported by the record. The court's finding that HVIS was the linchpin of

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[6] The trial court found that the absence of blood and brain matter was a wash because there was no blood and brain matter on applicant's arm either. The finding that the absence of such matter was a wash is unsupported by the record; there was testimony that applicant's arm could have been shielded by something like a towel.

the State's case is not supported by the record. Even conceding that it was important, doubt was cast upon only one aspect of the HVIS testimony. Something produced a stain on the gown in a pattern that is associated almost exclusively with gunshots. Under the circumstances of this case, the lack of scientific certainty as to what that substance was is not sufficient to establish a denial of due process.

Believing that applicant has failed to establish a right to relief under any of her claims or under due process, I would deny relief.

MANSFIELD, J., joins this dissent.

END OF DOCUMENT

42 U.S.C.A. § 1983

UNITED STATES CODE ANNOTATED, TITLE 42.
THE PUBLIC HEALTH AND WELFARE,
CHAPTER 21 CIVIL RIGHTS
SUBCHAPTER I GENERALLY

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Current through P.L. 107-89, approved 12-18-01

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Credit(s)

1994 Main Volume

(R.S. § 1979; § Pub.L. 96-170, 1, Dec. 29, 1979, 93 Stat. 1284.) 2001 Electronic Update

(As amended § Pub.L. 104-317, Title III, 309(c), Oct. 19, 1996, 110 Stat. 3853.)

Historical and Statutory Notes

Revision Notes and Legislative Reports

1979 Acts. House Report No. 96-548, see 1979 U.S. Code Cong. and Adm. News, p. 2609.

1996 Acts. Senate Report No. 104-366, see 1996 U.S. Code Cong. and Adm. News, p. 4202.

Codifications

R.S. § 1979 is from Act Apr. 20, 1871, c. 22, § 1, 17 Stat. 13.

Section was formerly classified to section 43 of Title 8, Aliens and Nationality.

Amendments

1996 Amendments. § Pub.L. 104-317, 309(c), inserted provisions relating to immunity of judicial officers from injunctive relief unless declaratory decree was violated or declaratory relief is unavailable.

1979 Amendments. Pub.L. 96-170 added "or the District of Columbia" following "Territory," and provisions relating to Acts of Congress applicable solely to the District of Columbia.

Effective and Applicability Provisions

1979 Acts. Amendment by Pub.L. 96-170 applicable with respect to any deprivation of rights, privileges, or immunities secured by the Constitution and laws occurring after Dec. 29, 1979, see section 3 of Pub.L. 96-170, set out as a note under section 1343 of Title 28, Judiciary and Judicial Procedure.

Cross References

Attorney's fees to prevailing party other than United States, see § 42 USCA 1988.

Citizenship clause, see § USCA Const. Amend. XIV, 1.

Conspiracy to interfere with civil rights, damages for, see § 42 USCA 1985. Institutionalized persons required to exhaust remedies to maintain action under this section, see § 42 USCA 1997e.

Jurisdiction of district courts of civil rights actions, see § 28 USCA 1343. Privileges and immunities clauses, see § USCA Const. Art. IV 2, cl. 1 and § Amend. XIV, 1.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

FREDA SUSAN MOWBRAY, A/K/A SUSIE MOWBRAY	§	
Plaintiff,	§	
v.	§	
CAMERON COUNTY, THE HONORABLE BENJAMIN EURESTI, THE HONORABLE EDMUND CYGANIEWICZ, LOUIS SAENZ, MENTFORD "DUSTY" HESSKEW, GEORGE GAVITO, STEVE ROBERTSON, ESTELLA MAURICIO, JEANNE MOWBRAY, MARGO MOWBRAY, and JAMES MOWBRAY	§	CIVIL ACTION NO. B-98-183 JURY
Defendants.	§	

PLAINTIFF'S THIRD AMENDED COMPLAINT

Plaintiff, Freda Susan "Susie" Mowbray ("Plaintiff") files this Plaintiff's Third Amended Complaint, complaining of Defendants Cameron County, *et al.*, and states the following claims for relief:

PARTIES

1. Plaintiff Freda Susan Mowbray, a/k/a Susie Mowbray ("Plaintiff" or "Mowbray"), is a resident of Dallas County, Texas.

2. Defendant Cameron County is a governmental entity which has appeared in this action.

3. Defendant Benjamin Euresti ("Euresti") is a resident of Cameron County, Texas who is sued in both his official and individual capacities and has made an appearance in this action.

4. Defendant Edmund Cyganiewicz ("Cyganiewicz") is a resident of Cameron County, Texas who is sued in both his official and individual capacities and has made an appearance in this action.

5. Defendant Louis Saenz ("Saenz") is a resident of Cameron County, Texas who is sued in both his official and individual capacities and has made an appearance in this action.

6. Defendant Mentford "Dusty" Hesskew ("Hesskew") is a resident of Travis County, who was a City of Austin police officer at the time of the events described herein. He is sued in both his official and individual capacities and has made an appearance in this action.

7. Defendant George Gavito ("Gavito") is a resident of Cameron County, Texas who is sued in both his official and individual capacities and has made an appearance in this action.

8. Defendant Estella Mauricio ("Mauricio") is a resident of Cameron County, Texas who is sued in both her official and individual capacities and has made an appearance in this action.

9. Defendant Steve Robertson ("Robertson") is a resident of Travis County, Texas who is sued in both his official and individual capacities and has made an appearance in this action.

10. Defendant Jeanne Mowbray, upon information and belief, died on September 4, 1998. Plaintiff intends to

substitute the personal representative of the estate when that person is identified.

11. Defendant Margo Mowbray is a resident of Harris County, Texas and has made an appearance in this action.

12. Defendant James Mowbray is a resident of Lincoln, Nebraska and has made an appearance in this action.

13. Defendant Kristin Mowbray is a resident of Bexar County, Texas and has made an appearance in this action.

JURISDICTION AND VENUE

14. This Court has jurisdiction over this action because this controversy involves a federal question, specifically the violation of Plaintiff's rights as guaranteed by the United States Constitution, including her procedural due process rights to a fair trial as guaranteed by the Fourteenth Amendment, her Fourth Amendment right to be free from unreasonable search and seizures, and her Fifth Amendment right to a fair trial and to be protected against deprivation of liberty and property without due process, and to the violation of provisions of the Civil Rights Act of 1871, 42 U.S.C.A. § 1983. The Defendants participated in the denial of the rights of Plaintiff as secured to Plaintiff by the United States Constitution and/or the laws of the Untied States and at the time of the violation were persons acting under color of statute, ordinance, regulation, custom, or usage of the State of Texas. Thus, this Court has jurisdiction of this matter pursuant to 28 U.S.C.A. § 1331.

15. In addition, this Court has supplemental jurisdiction over Plaintiff's state law claims for false imprisonment, malicious prosecution, abuse of process, slander, intentional infliction of emotional distress and unjust enrichment/constructive trust in accordance with 28

U.S.C.A. § 1367 because these claims arise out of the same operative facts and the same transaction and/or occurrence as the federal question claims.

16. This Court has venue over this matter because all Defendants reside in the Southern District of the State of Texas and/or a substantial part of the events giving rise to the causes of action occurred in the Southern District of Texas. Thus, venue is proper under 28 U.S.C. § 1391.

Factual Background

17. Plaintiff's husband, Bill Mowbray, died of a gunshot wound to the head on September 16, 1987. Despite a dearth of direct evidence suggesting Plaintiff's guilt, many facts pointing to a suicide by Mr. Mowbray, and Plaintiff's proclamations of innocence, Plaintiff was convicted of the murder of Bill Mowbray and was sentenced to life in prison and assessed a $10,000.00 fine.

18. The facts supporting the conclusion that Mr. Mowbray committed suicide include an explanation by Plaintiff, the only eyewitness to the event, of how Mr. Mowbray had shot himself, evidence that Mr. Mowbray had at least twice before attempted suicide (including once by gunshot), evidence that Mr. Mowbray believed that he would soon be indicted by the Internal Revenue Service and face criminal charges related to fraud at his automobile dealership, and the absence of any blood or brain tissue on Plaintiff's clothing, which the state's own expert concluded would certainly have been there if Plaintiff had been holding the gun to Mr. Mowbray's head when the fatal shot was fired as contended by the State.

19. On the morning of September 16, 1997, the day that Mr. Mowbray died, an autopsy was performed. The

autopsy report notes the presence of a torn, markedly blood stained T-shirt. Defendant Cameron County had custody of that T-shirt at the autopsy.

20. On November 3, 1987, Defendants Euresti, Cyganiewicz, Robertson and Hesskew met in Austin. Mr. Robertson informed the other participants that, although there had been positive luminol results, a luminol test was only a presumptive test and was not proof that blood was present.

21. On November 9, 1987, Defendant Robertson of the Texas Department of Public Safety performed two confirmatory blood tests on the nightgown that Mrs. Mowbray had been wearing the night that her husband died. Both tests were negative, indicating that the substance tested was not human blood.

22. Despite the negative blood tests, Defendants began a search for an expert to testify that alleged stains on Mrs. Mowbray's nightgown indicated that she had murdered her husband. On November 16, 1997, the state asked Mr. Herbert Leon MacDonell to examine the nightgown. Mr. MacDonell, considered the world's leading expert on High Velocity Impact Splatter ("HVIS"), and referred to as the "father" of blood spatter analysis by Defendant Hesskew, concluded that from the state of the physical evidence, it was "very unlikely that [Plaintiff's night gown] was in close proximity to the victim's gunshot wound at the time of his shooting . . ." In fact, Mr. MacDonell was of the opinion that "it was more probable than not that the deceased died from a suicide rather than a homicide."

23. On November 18, 1987, Mr. McDonnell told defendants Euresti and Cyganiewicz that their was *no blood* on Mrs. Mowbray's nightgown. Mr. McDonnell's finding of no blood completely contradicted the state's theory of the case. Mr. MacDonell's laboratory work-

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sheet of that date confirms his verbal report to the prosecutors: "Nightgown has no pattern of high velocity impact splatter." On November 18, MacDonell further concluded that there was "no evidence of any kind of red spots that could in any way, shape or manner be considered blood." Defendant Cameron County, through its policymaker Defendant Euresti, and Defendant Cyganiewicz were present for the discussion of Mr. MacDonell's findings at MacDonell's office on November 18, 1987. This date was prior to the indictment of Plaintiff for the murder of Bill Mowbray.

24. The Defendants, dissatisfied with Mr. MacDonell's scientific analysis, invited him to Brownsville in early December, 1987 to view a "mock-up" of the crime scene and to analyze other physical evidence in an attempt to convince Mr. MacDonell to change his opinion. Defendants Saenz, Cyganiewicz, Euresti, Gavito and Mauricio participated in the staging of the mock crime scene in order to "sell" their theory of the case to Mr. MacDonell. Defendant Mauricio provided inaccurate information about the scene of Mr. Mowbray's death as the alleged first law enforcement officer on that scene. However, the Defendants were unable to persuade Mr. MacDonell to change his opinion. That same day, Mr. McDonnell confirmed to Defendant Gavito his earlier conclusion that his examination of Mrs. Mowbray's nightgown did not support the state's theory of the case. Despite MacDonell's opinion, Defendants continued to make public statements identifying Plaintiff as a suspect in her husband's death. Immediately following the December 2 meeting, Defendant Euresti stated that although he didn't feel he had a solid case before he met with MacDonell, he was now confident that he could get an indictment.

25. The Defendants, though disappointed by the results of Mr. MacDonell's analysis, were not about to let scientific conclusions by the world's foremost expert in the area stand in the way of their theory of the case. The Defendants, still in the investigative stage, turned to an expert who would, in defiance of the scientific facts, reach the conclusion they desired, that Plaintiff was responsible for the death of Bill Mowbray.

26. The Defendants found their mark in Defendant Hesskew, who defendants Euresti, Cyganiewicz and Saenz viewed as more "receptive" than Mr. McDonnell. Mr. Hesskew was an Austin police officer, who, on City of Austin time, assisted Cameron County on the Mowbray case. Hesskew testified under oath at the trial that human blood was found on the abdomen and chest areas of Plaintiff's night gown in a pattern consistent with HVIS, despite the negative tests conducted by Robertson. Based on his false testimony that blood was present on the nightgown, Hesskew concluded that the cause of death was homicide, that Plaintiff could have shot Mr. Mowbray in a manner that would result in the HVIS on Plaintiff's night gown which he observed, and that Plaintiff could not have been lying down next to her husband as he shot himself as claimed by Plaintiff in her defensive theory.

27. Hesskew came to this conclusion, in concert with Defendants Robertson, Gavito, Mauricio, Euresti, Saenz, Cyganiewicz, and Cameron County, despite his admission that without a positive confirmatory test, his testimony was "scientifically invalid." In addition to providing testimony under oath of the invalid conclusion that Mrs. Mowbray had murdered her husband, Defendant Hesskew also made misrepresentations to Plaintiff's blood expert in order to influence that expert's opinion. Hesskew told Plaintiff's expert Tom Bevel on two occasions that a confirmatory blood test had been done, and that it was

positive for the presence of human blood. These false statements caused Mr. Bevel to testify erroneously that there was blood on Mrs. Mowbray's nightgown.

28. Defendant Robertson testified at Mrs. Mowbray's trial. His trial examination was conducted by Defendant Euresti. A draft of the examination of Robertson contained a question as to the results of the confirmatory blood test. That question is crossed out on the draft, and Defendant Euresti never allowed either the jury or Mrs. Mowbray to learn that the confirmatory blood test was negative for the presence of human blood. Despite his knowledge that there was no proof of the presence of blood on Mrs. Mowbray's nightgown, Defendant Robertson, under Defendant Euresti's direction, told the jury over and over again that there were "blood droplets" on the gown.

29. Neither Robertson nor any of the other Defendants ever disclosed to Plaintiff or Plaintiff's counsel that the result of the tests indicated that the stains which Hesskew claimed were human blood were not in fact human blood. This evidence was unquestionably material exculpatory evidence.

30. Defendants also lost or destroyed critical evidence. Neither the t-shirt referred to in the autopsy report nor Plaintiff's "white house coat" which had been in the possession of Cameron County and/or the DPS lab were ever made available to Plaintiff by Defendants.

31. Without the loss of critical evidence, the suppression of the negative blood tests, the suppression of Mr. MacDonell's opinions and the fabrication of the false Robertson testimony and the admittedly invalid Hesskew testimony, the indictment, prosecution and conviction of Mrs. Mowbray would not have occurred. Despite requests from Plaintiff's trial counsel for the disclosure of exculpatory evidence via motion and

through the conduct of a *Brady* hearing in March, 1988, the Defendants never disclosed Robertson's test results. Moreover, Defendants never disclosed that Mr. MacDonell's had told them on November 18th that there was no blood on Mrs. Mowbray's nightgown, and did not disclose Mr. MacDonell's written report until, under threat of sanctions from the trial court, the State provided a report just days before the May 1988 trial.

32. The prosecutors and other Defendants were joined in their efforts to convict Mrs. Mowbray in violation of her constitutional rights by Defendant James R. Mowbray, the brother of Mr. Mowbray. Defendant Mowbray and his sister, Defendant Margo Mowbray, were estranged from Mr. Mowbray following a dispute relating to their father's estate. In his last will and testament, Mr. Mowbray had explicitly stated that "[i]t is my . . . intention that under no circumstances whatsoever shall my brother, JAMES R. MOWBRAY, or my sister, MARGO MOWBRAY . . . receive any benefits of my estate under this will."

33. Despite this clear expression of his brother's wishes, Defendant James Mowbray began working immediately after his brother's death to ensure Plaintiff's conviction so that he could reap financial gain from his brother's death.

34. In the last two weeks of September 1987, three months before Mrs. Mowbray was indicted, Defendant Mowbray, together with his law partner, spent fourteen hours meeting with prosecutors, investigators and witnesses to ensure that Plaintiff was prosecuted for her husband's death. In December 1997, the month Mrs. Mowbray was indicted, Defendant Mowbray and his partner spent more than three hours in telephone conferences with witnesses, investigators and prosecutors. On January 6, 1988, Defendant Mowbray and his

partner met with prosecutors and reviewed the evidence in the sheriff's possession. During Mrs. Mowbray's criminal trial, Defendant Mowbray worked with Defendant Cyganiewicz to prepare at least one witness' testimony.

35. In furtherance of the scheme, Defendant Mowbray and his wife filed an action in the name of the mother of Bill Mowbray, Jeanne Mowbray (now deceased) in the United States District Court to claim the insurance proceeds that were designated for Plaintiff upon the death of her husband. Jeanne Mowbray ultimately prevailed in that action on the ground that Plaintiff, at that time convicted of the murder of her husband, could not rightfully collect the insurance proceeds because of her conviction. On information and belief, Defendants Margo and James Mowbray received a substantial portion of the insurance proceeds awarded to Jeanne Mowbray.

36. Following Plaintiff's conviction, the daughter of Bill Mowbray, Kristin Mowbray brought a civil action in the District Court of Cameron County, 107th Judicial District, to claim insurance proceeds which were designated for Plaintiff. Kristin Mowbray prevailed in that action on the ground that Plaintiff, at that time convicted of the murder of Bill Mowbray, could not rightfully collect the insurance proceeds because of her conviction. On information and belief, Kristin Mowbray received a $1,142,768.55 plus interest in insurance proceeds which had been designated by Mr. Mowbray for Plaintiff.

37. Plaintiff's appeals of her conviction were unsuccessful until her Habeas Corpus petition was granted by the Texas Court of Criminal Appeals in 1997. The Habeas

Court made findings of fact including, among other things, that:

a) There was rationale for both murder and suicide.

b) The rationale for suicide was, at least, equally persuasive.... The decedent had attempted suicide at least twice prior to his death and had shot himself in one of these previous efforts. Decedent had vowed to kill himself.

c) The linchpin of the State's case was the [HVIS] alleged found on the front of [Plaintiff's] gown.

d) At [the Habeas hearing] Hesskew *recanted* his trial testimony as to HVIS. Hesskew admitted his testimony at trial was without *"scientific validity."*

e) Without Hesskew's testimony, and the conclusions he drew, there was another equally reasonable hypothesis other than [Plaintiff's] guilt: Mowbray's death was suicide or an accident.

f) The State's conduct in connection with MacDonell was, at best, questionable trial strategy, and, at worst, intentional deception of Applicant's counsel.

g) There seems to be no question that seven months before trial, the State's [counsel] knew MacDonell's findings and that they were exculpatory.

h) This Court heard and observed MacDonell as well as Hesskew. *MacDonell was far and away the more articulate, knowledgeable, and credible.* If the jury had heard MacDonell, and had Hesskew testified as he now does, or not testified at all... *there is a substantial probability a verdict of Not Guilty would have ensued.*

i) In stating its conclusion that, as a matter of law, the State had denied Plaintiff's due process right to a fair trial, the Habeas Court stated that:

j) "... State's counsel early on recognized the potential lethal effect of MacDonell's testimony on their theory of the case, and beginning in November and continuing until May *they engaged in a deliberate course of conduct to keep MacDonell's findings and opinions from [Plaintiff's] counsel until the last days before trial. Even then, they caused [Plaintiff's] counsel to believe MacDonell would be a witness and available for cross-examination.*"

38. The conduct described above was either performed directly by, or is attributable to, Defendants Cameron County, Euresti, Saenz, Cyganiewicz, Hesskew, Gavito, Robertson, and Mauricio. All Defendants had actual or constructive knowledge of the Robertson test results and MacDonell's findings and suppressed this exculpatory evidence in violation of Plaintiff's due process rights to a fair trial, which rights are secured by the Constitution of the United States.

39. As a result of the Defendants' wrongful conduct, Plaintiff was indicted, arrested, detained pre-trial, committed and incarcerated post-conviction for a period of more than nine (9) years.

FIRST CLAIM FOR RELIEF
VIOLATION OF 42 U.S.C.A. § 1983

40. Defendants Cameron County, Euresti, Cyganiewicz, Saenz, Gavito, and Mauricio acting under color of statute, ordinance, regulation, custom, or usage, of the State of Texas, have either directly subjected Plaintiff to, or caused Plaintiff to be subjected to, the deprivation of her civil rights including but not limited to her procedural due process rights to a fair trial as guaran-

teed by the Fourteenth Amendment; her Fourth Amendment right to be free from unreasonable search and seizure; and her Fifth Amendment rights to a fair trial and to be protected against deprivations of liberty and property without due process, in violation of 42 U.S.C.A. § 1983. Defendants' conduct violated clearly established statutory and/or constitutional rights of which a reasonable person would have known.

41. Defendant Cameron County explicitly adopted a policy authorizing such unconstitutional conduct, or alternatively, implicitly authorized a policy encouraging such unconstitutional conduct, or alternatively failed to correct a custom of tolerating such unconstitutional conduct. Defendants Euresti, Saenz, Cyganiewicz, Gavito, and Mauricio acted pursuant to an authorized policy and/or custom of Defendant Cameron County in effecting the deprivation of Plaintiff's civil rights, and those unconstitutional or illegal actions were ratified by final policymaker District Attorney Benjamin Euresti. Defendant Cameron County participated through its final policymaker Euresti in illegal and unconstitutional actions as he engaged in the setting of goals and the determination of how those goals would be achieved. Moreover, the County's inadequate training of Gavito, Mauricio, Saenz and Cyganiewicz amounts to a deliberate indifference to the rights of persons, like Mrs. Mowbray, with whom they come into contact.

42. Defendants effected such deprivation through, among other things, their suppression of evidence early in the pre-probable cause and pre-indictment period of the investigative stage, their manufacture of false evidence early in the investigative stage, and their failure to disclose exculpatory evidence to Plaintiff's counsel before, during, or within a reasonable time after the *Brady* hearing and before trial, despite a specific demand for such disclosure by Plaintiff's counsel. De-

fendants also effected such deprivation through, in the words of the Habeas Court, their *"deliberate course of conduct to keep MacDonell's* [exculpatory] *findings and opinions from* [Plaintiff's] *counsel until the last days before trial. Even then they caused* [Plaintiff's] *counsel to believe MacDonell would be a witness and available for cross-examination."*

43. Plaintiff's conviction has been held invalid by a state tribunal authorized to make such determinations. (*See Ex Parte Mowbray,* 943 S.W.2d 461 (Tex. Crime. App. 1997), *cert. denied, Texas v. Mowbray,* 117 S.Ct. 2513 (1997)).

44. As a result of Defendants' violation of 42 U.S.C.A. § 1983 described above, Plaintiff was severely injured and is entitled to damages as more fully described in the Demand for Relief below at ¶ 70.

Second Claim for Relief
Conspiracy to Violate Civil Rights

45. Defendants Cameron County, Euresti, Cyganiewicz, Gavito, Saenz, Hesskew, Mauricio, Robertson, and James Mowbray entered into an agreement to accomplish the illegal goal of violating Plaintiff's civil rights including but not limited to her procedural due process rights to a fair trial as guaranteed by the Fourteenth Amendment, her Fourth Amendment right to be free from unreasonable search and seizure, and her Fifth Amendment right to a fair trial and to be protected against deprivations of liberty and property without due process.

46. The above named Defendants committed several overt acts in furtherance of their illegal agreement, including but not limited to, Defendants Mauricio and Gavito "staging" the crime scene mock-up for the December 1987 presentation to MacDonell, the failure of Defen-

dant Gavito and Defendant Cameron County through its policy maker Euresti. to disclose all of the physical evidence to Plaintiff, Defendant Robertson's failure to disclose the negative blood results to Plaintiff, Defendants Saenz and Cyganiewicz orchestrating the investigation to preclude disclosure and evaluation of exculpatory Defendants further acted on their illegal agreement by, among other things, seeking the indictment of Plaintiff despite the lack of probable cause to do so and with knowledge of evidence that eviscerated the State's theory of the crime and exonerated Plaintiff as well as failing to notify Plaintiff's counsel of the existence of the exculpatory findings made by MacDonell and Robertson.

47. As a result of the conspiracy entered into and carried to fruition by the above named Defendants, Plaintiff was severely injured and is entitled to damages as more fully described in the Demand for Relief below at ¶ 70.

Third Claim for Relief
False Imprisonment

48. Defendants Cameron County, Euresti, Saenz, Gavito, and Mauricio, acting in their official capacities, willfully detained Plaintiff absent the authority of law and without Plaintiff's consent. In the alternative, the above named Defendants willfully detained Plaintiff, with authority of law, without Plaintiff's consent and with the intent of covering and/or concealing their illegal goal of the wrongful imprisonment of Plaintiff.

49. Under either theory above, Defendants acted maliciously with an intent to inflict severe injury on Plaintiff, namely to deprive Plaintiff of her liberty, without her consent, with no legal justification.

50. Under either theory above, the intentional conduct of the Defendants led to the wrongful confinement of Plaintiff against her will pretrial and after trial, for a period of almost ten years.

51. As a result of the Defendants' false imprisonment of Plaintiff, Plaintiff suffered severe injury and is entitled to damages as more fully described in the Demand for Relief below at ¶ 71.

FOURTH CLAIM FOR RELIEF
MALICIOUS PROSECUTION

52. Defendants Cameron County, Mowbray, Gavito, and Mauricio maliciously commenced a criminal prosecution against Plaintiff, which eventually terminated in favor of Plaintiff, absent probable cause, with such prosecution resulting in severe injury to Plaintiff. At the time the prosecution commenced, the above named Defendants neither actually believed nor had reason to believe that Plaintiff was guilty of the crime for which she was prosecuted. In fact, at the time of the commencement of prosecution, Defendants were in possession of and concealing from Plaintiff and Plaintiff's counsel the findings of Robertson and Mr. MacDonell. This evidence exonerated Plaintiff and, once known to Defendants, destroyed the possibility of any reasonable belief of Plaintiff's guilt on their part. Furthermore, Plaintiff is actually innocent of the crime for which she was prosecuted.

53. As a result of the malicious conduct of the above named Defendants, Plaintiff has suffered severe injuries as more fully described in the Demand for Relief below at ¶ 72.

Fifth Claim for Relief
Abuse of Process

54. Defendants Cameron County, Euresti, Gavito, Saenz, and Mauricio improperly used service of legal process with the ulterior motive of seeking publicity for themselves and/or their offices and to attempt to coerce a guilty plea from Plaintiff. Defendants' use of legal process was conducted absent probable cause to do so. In fact, Defendants were actually or constructively aware of evidence exonerating Plaintiff.

55. As a result of Defendants' wrongful conduct, Plaintiff was severely injured as more fully described in the Demand for Relief below at ¶ 73.

Sixth Claim for Relief
Slander

56. Defendants Cameron County and Euresti orally made one or more defamatory statements, which statement(s) they knew to be false. Defendants published the false statements to third parties, namely the news media and the general populace through the news media with an unmistakable reference to Plaintiff.

57. The above named Defendants orally represented to the news media and to the general populace the false statement(s) that there was probable cause to arrest and charge Plaintiff for the murder of her husband, Bill Mowbray and that Plaintiff had committed the crime of murder. At the time the Defendants made the statement(s), they knew the statement(s) was/were false or made the false statement(s) with a reckless disregard for whether the statement(s) were true or false. Such false statement(s) is/are defamatory *per se.*

58. In addition, the above named Defendants orally represented to the news media and to the general populace

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the false statement(s) that Plaintiff had lied in her statements to investigators. At the time the Defendants made the statement(s), they knew the statement(s) was/were false or made the false statement(s) with a reckless disregard for whether the statement(s) were true or false. Such false statement(s) is/are defamatory *per se*.

59. As a result of the above named Defendants' slanderous statements, Plaintiff suffered substantial injury as more fully described in the Demand for Relief below at ¶ 74.

Seventh Claim for Relief
Intentional Infliction of Emotional Distress

60. Defendants Cameron County, Euresti, Cyganiewicz, Gavito, Saenz, Hesskew, Mauricio, and Robertson intentionally and/or recklessly engaged in extreme and outrageous conduct including but not limited to violating Plaintiff's civil rights, conspiring to violate Plaintiff's civil rights, and defaming Plaintiff. The Defendants acted with the specific intent of causing substantial injury to Plaintiff or, alternatively, the Defendants acted with a conscious disregard for an extreme degree of risk of substantial harm to Plaintiff's rights, safety, or welfare. Defendants' conduct caused Plaintiff to suffer severe emotional distress which continues to this day.

61. As a result of the above named Defendants' intentional and/or reckless, extreme and outrageous conduct, Plaintiff suffered severe emotional distress and is entitled to damages as more fully described in the Demand for Relief below at ¶ 75.

EIGHTH CLAIM FOR RELIEF
UNJUST ENRICHMENT / CONSTRUCTIVE TRUST

62. As described above, the wrongful conduct of the Defendants named in the First and Second Claims for Relief resulted in Plaintiff's conviction for the murder of her husband.

63. As a result of Plaintiff's conviction, Jeanne Mowbray was awarded insurance proceeds in the amount of $749,708.00 and real and/or personal property which should have been rightfully inherited by Plaintiff. On information and belief, Defendant Jeanne Mowbray distributed a significant portion of this sum to Defendants Margo and James Mowbray.

64. As a result of Plaintiff's conviction, Defendant Kristin Mowbray was awarded approximately $1 million in insurance proceeds which were originally designated for Plaintiff and real and/or personal property which should have been rightfully inherited by Plaintiff.

65. Plaintiff's conviction has since been overturned and, upon retrial, Plaintiff was found not guilty of the murder of her husband. This finding defeats the necessary condition that Plaintiff was the "principal or an accomplice in willfully bringing about the death of the insured" as required by the Insurance Code for forfeiture of insurance proceeds. TEX. INS. CODE ANN. art. 21.23 (Vernon Supp. 1997).

66. If not for the wrongful conduct of the Defendants, Plaintiff would have received the insurance proceeds and real and personal property as detailed above.

67. Defendants Jeanne Mowbray, Margo Mowbray, James Mowbray and Kristin Mowbray are therefore third party beneficiaries of the wrongful conduct by the Defendants. As third party beneficiaries of the above described wrongful conduct, the property received as a result of the wrongful conduct is held in a constructive

trust for the benefit of the rightful owner, Plaintiff Freda Susan Mowbray.

68. Plaintiff was severely injured by the Defendants' wrongful conduct and is entitled to damages as more fully described in the Demand for Relief below at ¶ 76.

Demand for Relief

69. WHEREFORE, Plaintiff Freda Susan Mowbray prays for judgment against Defendants for the claims stated in this Plaintiff's Original Complaint and seeks actual and exemplary damages for the injuries described below:

70. As to the **First Claim for Relief, Violation of 42 U.S.C.A. § 1983**, and the **Second Claim for Relief, Conspiracy to Violate Civil Rights:**

    a) Plaintiff was publicly humiliated and subjected to scorn and ridicule during the investigative phase of the prosecution, when Defendants continued to publicly identify her as a suspect despite their knowledge of facts exonerating Plaintiff; she was then indicted for the murder of her own husband, arrested, detained after her arrest and put through an emotionally damaging trial for both her and her children.

    b) Plaintiff was detained pretrial and imprisoned after trial for nearly ten years from the time of her arrest until the time of her acquittal at the retrial. During her imprisonment, Plaintiff was deprived of her own liberty, subjected to the fear and danger of being incarcerated with violent criminals, and was deprived of the once in a lifetime opportunity to watch: her children grow up; her daughter cheerlead in high school, either of her children graduate from high school, her son

play college football, or either of her children attend college and begin their adulthood.

c) Plaintiff was deprived of the opportunity to engage in gainful employment and earn wages or other income for a period of ten years, and Defendants' conduct so seriously damaged the reputation of Plaintiff that gainful employment is unlikely in the future.

d) Plaintiff was denied her inheritance rights.

e) Plaintiff was denied her rights to the proceeds of life insurance, which proceeds Plaintiff had been specifically designated as the beneficiary. If not for Defendants wrongful conduct, Plaintiff would have collected proceeds in an amount in excess of $1.7 million.

f) Plaintiff has incurred legal fees for her defense, appeal of her conviction through the state courts and to the United States Supreme Court, Habeas Corpus proceedings including defense of the State's appeal to the United States Supreme Court, civil litigation regarding entitlement to insurance proceeds and inheritance rights, and the instant lawsuit to vindicate Plaintiff's civil rights and the denial thereof by Defendants.

71. As to the **Third Claim for Relief, False Imprisonment:**

a) Continuing anxiety and depression,

b) Mental suffering including, but not limited to, continuing humiliation, anguish and shame as well as fear of physical and emotional abuse during imprisonment,

c) Loss of reputation,

d) Legal fees for her defense, appeal of her conviction through the state courts and to the United

States Supreme Court, habeas corpus including defense of the State's appeal to the United States Supreme Court, civil litigation regarding entitlement to insurance proceeds and inheritance rights, and the instant lawsuit to vindicate Plaintiff's civil rights and the denial thereof by Defendants.

72. As to the **Fourth Claim for Relief, Malicious Prosecution:**

a) Plaintiff was publicly humiliated and subjected to scorn and ridicule during the investigative phase of the prosecution, when Defendants continued to publicly identify her as a suspect despite their knowledge of facts exonerating Plaintiff; she was then indicted for the murder of her own husband, arrested, detained after her arrest and put through an emotionally damaging trial for both her and her children;

b) loss of time;

c) injury to feelings, reputation, character, and health;

d) mental suffering;

e) impairment of social and mercantile standing;

f) loss of property, including but not limited to, her home, her inheritance, her right to insurance proceeds;

g) loss of credit;

h) loss of earnings;

i) attorney's fees necessary to defend the malicious prosecution and to secure Plaintiff's release from the imprisonment resulting from the malicious prosecution.

73. As to the **Fifth Claim for Relief, Abuse of Process:**

a) Plaintiff was publicly humiliated and subjected to scorn and ridicule during the investigative phase of the prosecution, when Defendants continued to publicly identify her as a suspect despite their knowledge of facts exonerating Plaintiff; she was then indicted for the murder of her own husband, arrested, detained after her arrest and put through an emotionally damaging trial for both her and her children;

b) loss of time;

c) injury to feelings, reputation, character, and health;

d) mental suffering;

e) impairment of social and mercantile standing;

f) loss of property, including but not limited to, her home, her inheritance, her right to insurance proceeds;

g) loss of credit;

h) loss of earnings;

i) attorney's fees necessary to correct/defend the abuse of process and to secure Plaintiff's release from the imprisonment resulting from the Defendants' abuse of process.

74. As to the **Sixth Claim for Relief, Slander:**

a) loss of reputation;

b) injury to her character;

c) injury to her feelings;

d) mental suffering;

e) mental anguish; and

f) decreased earning capacities.

75. As to the **Seventh Claim for Relief, Intentional Infliction of Emotional Distress:**

a) Mental pain and suffering;

b) Physical pain and suffering;

c) Loss of liberty for a period exceeding nine years, including pre-trial and post-conviction incarceration;

d) Loss of past and future earnings capacities;

e) Loss of insurance proceeds in the amount of $749,708.00; and

f) Loss of Plaintiff's inheritance.

76. As to the **Eighth Claim for Relief, Unjust Enrichment / Constructive Trust:**

a) Plaintiff seeks a declaration that the insurance proceeds for which Plaintiff was the designated beneficiary, but which were paid to Kristin Mowbray, Jeanne Mowbray, Margo Mowbray, and James Mowbray following Plaintiff's conviction, are held by those Defendants in constructive trust for Plaintiff's benefit.

b) In addition, Plaintiff seeks a declaration that the real and personal property to which she had an inheritance right but which were delivered to Kristin Mowbray, Jeanne Mowbray, Margo Mowbray, and James Mowbray following Plaintiff's conviction are held in constructive trust for Plaintiff's benefit.

c) Plaintiff further seeks an order instructing Defendants Kristin Mowbray, Jeanne Mowbray, Margo Mowbray, and James Mowbray to deliver to Plaintiff the insurance proceeds and other real and personal property held in trust by the De-

fendants for Plaintiff's benefit, with earnings accruing thereon and/or pre-judgment interest as may be allowed by law.

77. In addition, the award of exemplary damages is warranted for each and every claim for relief identified in this Complaint in order to punish the Defendants' malicious conduct, which was intended to cause substantial injury to Plaintiff and/or was undertaken with a reckless disregard for the extreme degree of risk of substantial harm to Plaintiff's rights, safety, or welfare. Exemplary damages are also warranted to deter such malicious conduct in the future.

78. Plaintiff also seeks pre- and post-judgment interest as allowed by law.

79. In addition, Plaintiff seeks costs of court and attorney's fees for each of the claims for relief stated above.

80. Plaintiff further seeks all relief to which she shows herself entitled to at law or in equity.

Respectfully submitted,

By: /s/ JUDITH W. BAGLEY
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Judith W. Bagley
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Plaintiff's Third Amended Complaint was served via facsimile and first class U.S. Mail on the 29th day of November, 1999, to the following counsel of record:

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